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SUPREME COURT, U.S.

No. 07-1050

In The

Supreme Court of the United States

HARVEY P. WHITE, *et al.*,

Petitioners,

v.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether certiorari review should be granted to determine whether or not the courts below applied Mississippi state law or federal law on the doctrine of equitable estoppel, in order to determine when non-signatories are bound to an arbitration provision, where:

(1) both the petitioners and respondents had argued below that Mississippi law on the subject was *consistent* with federal law;

(2) the petitioners had the opportunity to have the Mississippi Supreme Court clarify the basis for its ruling by filing an application for rehearing asking the court if it had rejected following federal law, but they failed to seek rehearing;

(3) the petitioners *admit* the Mississippi Supreme Court opinion does not clearly express that it followed a state court doctrine differing from the doctrine followed by federal courts;

(4) the petitioners have failed to sufficiently establish that any purported distinction between the Mississippi state and the federal doctrine of equitable estoppel (as applied to arbitration provisions that they have alleged) actually exists, or that there is a meaningful conflict among the courts;

(5) the contract under which the nonsignatory petitioners claim a right to resolve their dispute with

RESTATEMENT OF THE QUESTION PRESENTED – Continued

the nonsignatory respondents expressly excludes nonparties and limits rights under the arbitration provision and contract as a whole *solely* to its two named signatories; and

(6) the claims of the nonsignatory respondents do not arise out of the contract to which neither of petitioners and respondents were parties, but, instead, arise out of subsequent and wholly separate tortious conduct of nonsignatory petitioners.

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COUNTER STATEMENT OF THE CASE

I. Summary of the Respondent Whittington Plaintiffs' Claims

This tort action arises from the actions, omissions, and misrepresentations made by the Petitioners Harvey P. White et al., (referred to herein as "White Defendants")[1] that Respondents Homer A. Whittington et al., ("Whittington Plaintiffs") allege constitute common law fraud as well as violations of the Securities Act of Mississippi (the Mississippi Act) and Sections 11 and 15 of the Federal Securities Act of 1933 ("1933 Act"). App. B at 117.

American Wireless Group ("AWG"), who is not a party to this action, is a Mississippi limited liability company which owned significant wireless communication licenses issued by the Federal Communications Commission ("FCC"). *Id.* at 118. The Whittington Plaintiffs were some of the members of AWG. *Id.* Leap Wireless International ("Leap"), also not a party to this action, was a wireless communications carrier, primarily offering unlimited wireless service under the brand name "Cricket." *Id.* Leap was a publicly held company and its stock was listed on the NASDAQ/NMS and traded under the symbol, "LWIN." *Id.* The White Defendants are among the former officers and directors of Leap. App. B at 118.

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[1] Below the White Defendants were referred to as the "Leap Defendants."

On February 7, 2001, AWG entered into a contract with Leap, entitled "Agreement for Purchase and Sale of Licenses" (the "Leap-AWG contract")[2] to sell FCC Licenses that AWG owned for Jackson, Mississippi; Birmingham, Alabama; Tuscaloosa, Alabama; and Jonesboro, Arkansas (the "Licenses"), to Leap for 1,900,829 shares of Leap stock. *Id.* at 119. 190,083 of the shares were to be held in escrow for one year. *Id.* The Leap stock was issued as a private placement pursuant to certain registration exemptions under the 1933 Act. Pet. App. at 9. The Leap-AWG contract required Leap to register the Leap stock within 30 days following the closing. App. B at 119. The closing occurred on June 8, 2001, and the Leap shares held in escrow were released one year later on June 8, 2002. *Id.* On June 15, 2001, as required by the Leap-AWG contract, Leap caused a Registration Statement for the entire 1,900,829 shares of Leap Stock to become effective with the SEC. *Id.*

Before the June 8, 2001 closing of the Leap-AWG contract, it was planned that members of AWG who so desired would later have the opportunity to become Leap shareholders. *Id.* Because AWG had unaccredited investors among its membership, Leap was unwilling and unable to issue Leap Stock directly to AWG members. *Id.* (Moreover, some AWG members

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[2] The Leap-AWG contract contained an arbitration provision which was expressly limited to solely Leap and AWG.

desired to have the election not to own Leap stock.) Therefore, a scenario was devised, which contemplated the following steps for those AWG members who did want to own Leap stock: (1) Leap would issue the Leap stock to AWG, as the accredited investor; (2) Leap would not allow AWG to dissolve and distribute the stock to its members; instead Leap would register the stock for public resale in AWG's name; and (3) the AWG members could then – over a drawn-out period of time regulated by Leap's concern over impact on market trading prices – later buy the Leap Stock in essentially simultaneous purchases effected at then-prevailing open market trading prices, as AWG sold an equivalent number of shares, and UBS (as a broker-dealer) would serve as the seller of the Leap Stock in the buy back. App. B at 119-120.

The members of AWG had the option to purchase shares of the Leap Stock or to receive a cash sum equal to their membership interest. *Id.* at 120. Starting in August 2001, the Whittington Plaintiffs, based on the inducements and representations in Leap's then current filings with the SEC, were among those of the AWG members who chose to purchase the Leap stock through UBS. *See id.* If the White Defendants had not concealed and misrepresented Leap's true financial picture in public disclosures, the Whittington Plaintiffs would not have elected to purchase (and retain) the Leap Stock, during the period of August 2001 to the summer of 2002.

The Whittington Plaintiffs were induced to invest in Leap and hold onto their Leap stock by several

entities and individuals, including the White Defendants. They were induced to buy and to hold the Leap Stock by misrepresentations and omissions of material fact made by or on behalf of the White Defendants in: public filings (including annual and quarterly reports and a registration statement); press releases and statements to the press; and statements to analysts. These misrepresentations and omissions occurred up to and through the summer of 2002. The Whittington Plaintiffs' claims are based on the misrepresentations and omissions of material fact made by the White Defendants after (and independently of) the Leap-AWG contract, over a long period of time subsequent to the time AWG acquired its Leap shares, rather than prior to or pursuant to the Leap-AWG contract, and their damages arise from their reliance on these misrepresentations and omissions. This is not a breach of contract or breach of warranty case.

II. Summary of the Proceedings Below

The Whittington Plaintiffs filed their complaint in December 2002, in the Circuit Court for the First Judicial District of Hinds County, Mississippi (the "Hinds County Circuit C rt"). App. B at 115. In May 2003, the White Defendants improvidently removed the case to the United States District Court for the Southern District of Mississippi. Because three judges assigned to the case recused themselves, this case was stalled at the federal level for almost a year. *Id.* at 116. In April 2004, this case was reassigned to

the Honorable David Bramlette, who, in September 2004, granted the Whittington Plaintiffs' motion to remand. *Id.*

After remand to the Hinds County Circuit Court, in January 2005, the White Defendants filed a "Motion to Compel Arbitration and Stay Proceedings, or in the alternative, to Dismiss Plaintiffs' First Amended and Restated Complaint." *Id.* at 117. In August 2005, the circuit court properly denied the motion and the White Defendants appealed to the Supreme Court of Mississippi. *Id.*

This case was consolidated at the Mississippi Supreme Court with other pending appeals. On November 17, 2007, the Mississippi Supreme Court entered its opinion and order affirming the Hinds County Circuit Court's denial of the White Defendants' Motions and remanding the case for further proceedings. Pet. App. at 1-31. The White Defendants did not petition the Mississippi Supreme Court for a rehearing. Instead they merely asked the Mississippi Supreme Court to stay the remand, which stay was granted. Pet. at 8. Later, they filed the present Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. Introduction

This case arises from an unsuccessful attempt by petitioners Harvey P. White et al., defendants below

(referred to herein as "White Defendants"), to compel arbitration of the claims brought against them by respondents Homer A. Whittington, Jr., et al. (referred to as "Whittington Plaintiffs"), under state and federal securities laws and Mississippi tort law. The claims against the White Defendants are based upon misrepresentations and omissions they made in public filings, press statements and statements to analysts over a lengthy period of time, which induced the Whittington Plaintiffs' months-long series of purchases of shares of stock of Leap Wireless International, Inc. ("Leap").[3] The White Defendants, who are former officers and directors of Leap, moved the trial court to compel arbitration of the claims even though there is *no arbitration agreement* between any of them and any of the Whittington Plaintiffs, nor are the White Defendants or Whittington Plaintiffs signatories to arbitration agreements with anyone else.

The White Defendants moved the trial court for what could be called arbitration by "double equitable estoppel" based upon an arbitration provision found in a contract between two entities, Leap and American Wireless License Group, LLC ("AWG"). The Leap-AWG contract – which expressly *disclaimed* giving anyone else third party beneficiary status – provided

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[3] Leap is a wireless telecommunications company that eventually went bankrupt following the conclusion of a legal dispute with a third party whose true risk of liability to Leap was withheld from the Whittington Plaintiffs.

for the transfer of Federal Communications Commission licenses from AWG to Leap in exchange for Leap stock. During a period of a half a year after closing of the Leap-AWG transaction, AWG's Leap stock was sold in multiple transactions through a broker, and was purchased in increments over such time period through the same broker by the Whittington Plaintiffs, at times when, they allege, the White Defendants were issuing misleading reports, press releases and statements to analysts. The Whittington Plaintiffs do not comprise all of the AWG members (many of whom did not participate in making purchases of Leap stock).

Although: (1) the Whittington Plaintiffs are *not* parties to the Leap-AWG contract or mentioned therein as third party beneficiaries, (2) the White Defendants are *not* parties to the Leap-AWG contract or mentioned therein as third party beneficiaries, (3) the Leap-AWG contract limits arbitration of disputes to *solely* the Leap entity and the AWG entity, (4) the Leap-AWG contract expressly states that *no rights or remedies* under the contract accrue to any other persons (other than successors and assigns) besides the Leap entity and the AWG entity, and (5) the Whittington Plaintiffs' claims arise out of stock purchases *not* made under the Leap-AWG contract but, instead, out of voluntary prevailing-market-price purchases made through a broker (not a party to this case) up to a half a year later, under different fact and disclosure circumstances obtaining at the times

of purchase; nevertheless, the petitioners asked the lower courts to order the dispute to arbitration.

The White Defendants argued that the doctrine of equitable estoppel allowed them, even as *nonsignatory defendants,* to gain a right to demand that the Whittington Plaintiffs, even as *nonsignatory plaintiffs*, arbitrate their claims. They argued to the Mississippi courts that such arbitration was required under Mississippi's state law doctrine of equitable estoppel, and stated Mississippi law was *consistent* with federal precedent on the issue. (However, the White Defendants now tell this Court a much *different* story.)

The Whittington Plaintiffs, respondents here, agreed with the petitioners and, like the petitioners, never argued in the Mississippi Supreme Court for a differing standard, as between state and federal law on "equitable estoppel," to apply to this case. The "issue" the Petition now attempts to raise in this Court was simply *not* an issue in the state court proceedings, either for the parties or those courts. Both the trial court and the Mississippi Supreme Court rejected the argument that arbitration was required of a dispute where none of the parties to the lawsuit were arbitration signatories, the arbitration rights provided by the contract were strictly limited to the signatories, and the claims were not based upon the contract. Pet. App. at 15-17.

The White Defendants now argue to this Honorable Court in their Petition that in affirming the

denial of the arbitration motion the Mississippi Supreme Court implicitly applied state law differing from federal precedent on equitable estoppel and that this Court should provide instruction on whether, in the context of enforcement of an arbitration provision involving nonsignatories, Section 2 of the Federal Arbitration Act requires state courts to apply the doctrine of equitable estoppel as developed by the federal courts. However, the White Defendants *admit* that the Mississippi Supreme Court's alleged choice of state law over federal precedent on the doctrine of equitable estoppel to decide the appeal "is not directly expressed as such in the Decision," Pet. at 24, and the White Defendants did not request rehearing under Rule 40, Miss. R. App. P., to seek a clarification of the basis for that court's ruling.

The Whittington Plaintiffs respectfully submit that the White Defendants' characterization is too modest and that, in fact, the Mississippi Supreme Court did *not* eschew federal precedent and did *not* apply a rule of decision capitalizing on any conflict of state and federal law. In sum, for the foregoing and other reasons this case does not present a proper vehicle for certiorari review of the question presented.

II. The White Defendants Have Not Articulated a Compelling Reason to Justify Certiorari Review by This Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of

certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The White Defendants have *not* presented any compelling justification for this Honorable Court to exercise discretionary jurisdiction over their attempted appeal of the denial of their motion to compel arbitration where no arbitration agreement exists between the parties. Indeed, the Petition rests on a question presented alleging a distinction between the Mississippi state and the federal doctrine of equitable estoppel involving arbitration nonsignatories that the White Defendants *admit* is not clearly identifiable in the state supreme court opinion they wish reversed, and which they failed to present or preserve below or to even ask the state court to address. The Petition for a Writ of Certiorari should be denied because the facts and procedural posture of this case prevent it from being a proper vehicle for the issue the White Defendants wish to raise before this Honorable Court and, ultimately, the White Defendants' argument that the dispute below should be compelled to arbitration simply has no merit.

A. The White Defendants Failed to Preserve the Issue They Now Ask This Court to Address.

The White Defendants argue to this Court that the Mississippi Supreme Court followed its own state law (allegedly in conflict with federal law), rather than federal court precedent, in determining that the doctrine of equitable estoppel could not be used by them (as nonsignatory defendants) to require that the

Whittington Plaintiffs (as nonsignatory plaintiffs) arbitrate their claims, and that the court erred in doing so. However, this issue is *not* properly presented, was *not* preserved below, was *not* challenged below, and has thus been forfeited by the White Defendants.

1. The White Defendants Did Not Argue to the Lower Court That There Was a Distinction Between Applicable Federal Common Law and Mississippi Common Law, and That Federal Law Must be Followed.

The White Defendants argued on appeal to the Mississippi Supreme Court that Mississippi state law was *consistent* with the requirements of the Federal Arbitration Act and with federal court precedent regarding enforcement of arbitration agreements,[4] and they noted that the court favored enforcement of such agreements. They stated: "Notably, '[t]he law in

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[4] Similarly, the Whittington Plaintiffs did *not* argue to the Mississippi Supreme Court that there was a distinction between Mississippi law and federal precedent on the application of doctrine of equitable estoppel to arbitration nonsignatories. While citing Mississippi case law as well, the Whittington Plaintiffs relied heavily on federal court opinions, such as *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000); and *Primerica Financial Services, Inc. v. Coley*, 192 F. Supp. 2d 655 (N.D. Miss. 2002), for their argument that arbitration could not be ordered by the court under these facts. App. B at 18-19, 130-132, 139-140.

Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another.' *Smith Barney, Inc. v. Henry,* 775 So. 2d 722, 725 (Miss. 2001)." Pet. App. at 36. In their brief to the Mississippi Supreme Court, they cited numerous opinions from that court which they argued were support for the ruling they sought,[5] and *failed* to argue that there was any relevant distinction between applicable state law and the federal court precedent they also cited. Instead, the White Defendants argued that if the Mississippi Supreme court simply followed its *own* precedent, the requested ruling reversing the denial of the motion to compel arbitration would naturally result.

Nowhere did the White Defendants argue to the Mississippi Supreme Court, as they have to this Court at pages 22-28 of the Petition, that Section 2 of the Federal Arbitration Act ("FAA") mandates that the body of federal common law be followed by state courts in determining whether nonsignatories are bound by an arbitration provision by the doctrine of equitable estoppel, rather than any state law. They did not argue that any other state courts had determined that federal precedent on application of the

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[5] The White Defendants cited and discussed Mississippi Supreme Court opinions such as *MS Credit Center, Inc. v. Horton,* 926 So. 2d 167 (Miss. 2006); *Russell v. Performance Toyota, Inc.,* 826 So. 2d 719 (Miss. 2002); *Smith Barney, Inc. v. Henry,* 775 So. 2d 722 (Miss. 2001), as well as many federal court opinions. App. A at 74-80.

equitable estoppel doctrine must be followed. Instead, the White Defendants favorably cited the case of *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So. 2d 483 (Miss. 2005), to the lower court, and stated that the ruling they sought "is consistent" with that opinion. App. A at 88. Now, however, they argue that the lower court's reference to *Rogers* in its decision below is a red flag of error on the part of that court. Pet. at 25-26. The Petition cites *Rogers* to this Court as an example of the Mississippi Supreme Court's "refus[al] to follow the Fifth Circuit's law on equitable estoppel." *Id.* at 26. However, given their prior reference to *Rogers* in their brief to the lower court as an opinion merely distinguishable on its facts, the White Defendants' present attempt to invent an issue for certiorari review, where one does not exist, is highly disingenuous.

B. The Admitted Lack of Clarity in the Mississippi Supreme Court Opinion Regarding Whether It Refused to Follow Federal Common Law Makes This Case Inappropriate for Certiorari Review.

As the White Defendants grudgingly admitted in their Petition, the alleged failure by the Mississippi Supreme Court "to follow the federal law of arbitral estoppel is not directly expressed" in that court's opinion. Pet. at 24. (In fact, no expression at all, of any disagreement with federal law, is made by the Mississippi Supreme Court.) The White Defendants draw their conclusion that the lower court failed to

follow federal common law *merely* by the fact of the court's citation to its own case law in addition to several federal court opinions, and the court's statement in its decision that the issue involved "a simple question of contract interpretation." Pet. at 23-26. The Petition then criticizes the court's reference to its earlier opinion *Rogers, supra,* wherein the White Defendants now claim, based upon the comments of dissenting justice in that opinion, that the *Rogers* court failed to follow Fifth Circuit Court of Appeals precedent on equitable estoppel. *Id.* at 25-27. However, the White Defendants' questioning of the Mississippi Supreme Court's decision in this case based upon its opinion in *Rogers* some two years earlier is not a basis for certiorari review in *this* case. The weakness of the argument is further revealed by the fact that the White Defendants cited *Rogers* to the lower court as being distinguishable on its own facts, did not contend it was wrongly decided, and did not argue that it represented an improper divergence by the state court from federal law. App. A. at 88-89.

Moreover, Chief Justice Smith, who authored the dissent in *Rogers* so heavily relied upon by the Petition as support for the argument that the Mississippi Supreme Court has diverged from following federal precedent on this issue, *concurred* with the lower court's decision in this case. So, too, did Justice

Carlson, another dissenter in *Rogers*.[6] The concurring votes of those two particular justices in this case refute the White Defendants' argument that the decision below is aberrant from the federal common law on the subject.

Similarly, the White Defendants now criticize the lower court's opinion in *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703 (Miss. 2006), as also failing to follow federal precedent on arbitral equitable estoppel. Pet. at 26-27. However, when the White Defendants noted *Adams* in their reply brief to the court below, they did *not* describe it as an improper deviation from controlling federal common law, but merely stated it was distinguishable to its own differing facts. App. C at 219-220. The vastly differing manner in which the White Defendants treated the *Rogers* and *Adams* opinions prior to losing their appeal below demonstrates that the argument in their Petition is specious and should not be well taken.

Moreover, the White Defendants admit that the exact basis for the decision below is uncertain, and no amount of post-decision second-guessing of the lower court in their Petition can clarify that point. The White Defendants have simply not established that the decision of the Mississippi Supreme Court improperly conflicts with federal common law on the

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[6] Justice Cobb, who was also a dissenter in *Rogers*, is no longer a member of the Mississippi Supreme Court and thus was not a participant in the ruling now before this Court.

issue of requiring arbitration of nonsignatories by equitable estoppel. Instead of filing the present Petition with this Honorable Court based upon assumptions and parsing of prior decisions of the lower court, the White Defendants should have filed for a rehearing with the Mississippi Supreme Court pursuant to Rule 40, Miss. R. App. P., and requested a clarification for the basis of the decision. Thus, the issue now raised in the Petition *could have* been raised to the court below for a decision squarely on point. Only in that manner would the issue be properly preserved for further appeal to this Court. Therefore, the present posture of uncertainty as to the underlying basis for the decision below makes this case a poor vehicle for this Court to decide the question presented on by the Petition. This Court should, if in its wisdom, it desires to eventually address such an issue, await a case in which the issue is squarely presented in a challenged opinion, with an adequate record clearly defining a material conflict.

C. The White Defendants Have Failed to Demonstrate Meaningful Conflict or Confusion Among the States.

In addition to the fact that the basis for the decision of the Mississippi Supreme Court in the case below is not certain, the White Defendants have not even sufficiently established that a meaningful conflict exists between various courts as to whether state or federal law is controlling with regard to the application of equitable estoppel in relation to

enforcement of arbitration provisions under Section 2 of the FAA. Although they argue there is conflict and confusion among state courts, the White Defendants have not presented this Court with evidence of widespread confusion in the courts, but have merely cited to the dissent to the *Rogers* opinion of the Mississippi Supreme court and opinions of the Texas Supreme Court. Even if the conflict and confusion claimed by the White Defendants actually exists in those two jurisdictions (a contention the Whittington Plaintiffs dispute), that does not mean certiorari review is proper in this case where the question presented was never raised or preserved below. The White Defendants have simply not established a compelling justification for certiorari review.

III. The Lower Courts Did Not Err in Deciding This Fact-Specific Case.

In addition to the fact that the White Defendants have not presented a "compelling reason" for certiorari review in this case, there is *no basis* for certiorari review because the lower courts were correct in denying petitioners' motion to compel arbitration in this unique and fact-intensive case. The Petition fails to demonstrate any error on the part of the lower courts in that it does not cite any authority, under either federal or state law, demonstrating that the doctrine of equitable estoppel may be used by an arbitration nonsignatory defendant to compel of a dispute with a nonsignatory plaintiff under facts like those present here where (1) the arbitration provision

at issue expressly *limits* arbitration to solely the two entity parties to the sale-of-assets-for-stock contract and (2) the contract with the arbitration provision expressly *excludes* non-parties (such as the White Defendants and the Whittington Plaintiffs) from having any rights or remedies under the contract.

Here, Section 12.11 of the Leap-AWG contract states, in relevant part:

> [A]ny dispute, claim or controversy arising under this Agreement or in any way related to this Agreement, or its interpretation, enforceability or inapplicability may be submitted to binding arbitration at the election of either *Buyer* or *Seller*.

App. B at 127 (emphasis added). The contract expressly defines "Buyer" as AWG and "Seller" as Leap. *Id.* No other persons or entities are mentioned. Additionally, the contract makes clear that no other entities may claim rights or remedies under the contract, as Section 12.4(b) states:

> This agreement shall be binding upon and inure to the benefit of the parties hereto and their successor and Permitted Assigns. The successors and permitted assigns hereunder shall include without limitation, in the case of Buyer, and permitted Assignee as well as the successors in interest to such Permitted Assignee. *Nothing in this agreement, expressed or implied, is intended or shall be construed to confer upon any Person other than the parties or successors, and Permitted*

> *Assignees, any right, remedy or claim under or by reason of this Agreement.*

Id. (emphasis added). Thus, the Leap-AWG contract strictly limits any benefit under the contract to *solely* those two entities and precludes others, such as the White Defendants, from obtaining any benefit whatsoever from the contract, including using the arbitration provision as a basis for requiring nonsignatories to arbitrate their claims. Moreover, as the Mississippi Supreme Court's opinion shows, the alleged wrongful conduct of the White Defendants (concealment of material facts from the marketplace, including the Whittington Plaintiffs) occurred months *later*, in a *different* factual setting, when the Whittington Plaintiffs obtained the Leap stock in a series of small incremental stock purchases through a broker who was not a party to the earlier Leap-AWG contract. Given these unique facts, even if this Court has an interest in deciding the question posed by the White Defendants, this case presents a poor vehicle to use to address the issue. Accordingly, there is no compelling reason to justify certiorari review in this case.

CONCLUSION

The present petition fails to present a single compelling reason for certiorari review of the decision of the Mississippi Supreme Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix A

APPENDIX A – OPENING BRIEF OF WHITE DEFENDANTS (KNOWN BELOW AS LEAP DEFENDANTS-APPELLANTS) FILED NOVEMBER 17, 2006

IN THE SUPREME COURT OF MISSISSIPPI

Cause No. 2005-IA-001827-SCT

QUALCOMM INCORPORATED **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01829-SCT

QUALCOMM INCORPORATED **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI HONORABLE TOMIE T. GREEN, CIRCUIT JUDGE

OPENING BRIEF OF THE LEAP DEFENDANTS (APPELLANTS)

ORAL ARGUMENT REQUESTED

Appendix A

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Consolidated With:
Cause No. 2005-IA-01841-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

AMERICAN WIRELESS
LICENSE GROUP, LLC **APPELLEES**

Appendix A

Consolidated With:
Cause No. 2005-IA-01895-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01894

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01883

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made

in order that the Justices of the Supreme Court may evaluate possible disqualification and recusal.

1. Plaintiff/Appellee American Wireless License Group, LLC ("AWG"), the plaintiff in *American Wireless License Group, LLC v. White, et al.,* Hinds County Circuit Court Case No. 251-03-692 CIV (*"American Wireless"*);

2. Plaintiffs/Appellees Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr. Revocable Trust; Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E, Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pittman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, individually and as the Trustee for the Homer A. Whittington, Jr. Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and Shirley E. Smith, as Trustees for the Smith Family Trust; Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr.; William M. Yandell, III, individually and as the registered owner of the William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; Susan Yandell McKee; Walcott and Caldewell, LLC; Dr. Richard Rushing; Dr. Jane T. Mills; William P. Thomas; Darden North; Terrell Williams; Wirt A. Yerger, Jr.; James T. Thomas, IV; Claiborne P. Deming; David L. Meredith; Mary Jane Finney; David Bailey; Kim McDonald; Debra Morton; Gordon Morton; Gordon Morton IRA; Ann Carter Thomas; Betty J. Thomas Marital Trust; Bill Thomas; James T. Thomas; Martha Ross Thomas; W.P. Thomas, Jr.; Elaine A. Chatham; Henry E.

Chatham, Jr.; Franklin E. Chatham; Marie D. Chatham; Retirement Plan for Employees Wise Carter Child & Caraway; James C. Eckert; Lori Moskowitz; and Bertie Heiner (the "Whittington Plaintiffs"), the plaintiffs in *Whittington v. White,* Hinds County Circuit Court Case No. 251-03-692 CIV ("*Whittington*");

3. Eugene C. Tullos of Tullos & Tullos, attorneys for AWG and the Whittington Plaintiffs;

4. J. Michael Rediker, Peter J. Tepley, Page A. Poerschke, and Meredith Jowers Lees of Haskell Slaughter Young Rediker, LLC, of counsel for AWG and the Whittington Plaintiffs;

5. Defendants/Appellants Harvey P. White, Scot B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffrey P. Williams, Anthony R. Chase, Michael B. Targoff, Jill E. Barad, Robert C. Dynes, James E. Hoffmann, Stewart Douglas Hutcheson, Daniel O. Pegg, and Leonard C. Stephens (collectively, the "Leap Defendants"), defendants in *American Wireless* and *Whittington*;

6. David W. Clark and Mary Clay W. Morgan of Bradley Arant Rose & White, LLP, attorneys for the Leap Defendants;

7. Boris Feldman, Robert P. Feldman, Clayton Basser-Wall, and Mark T. Oakes of Wilson Sonsini Goodrich & Rosati, P.C., of counsel for the Leap Defendants;

8. Defendant/Appellant QUALCOMM Incorporated ("Qualcomm"), a defendant in *American Wireless* and *Whittington*;

9. Glen Gates Taylor, D. James Blackwood, and Wade Smith of Copeland, Cook, Taylor & Bush, P.A., attorneys for Qualcomm;

10. Defendant UBS Financial Services, Inc., a defendant in *American Wireless,* (named as UBS Paine Webber, Inc.) ("UBS");

11. W. Whitaker Rayner of Watkins Ludlam Winter & Stennis, P.A., attorneys for UBS; and

12. Daniel Cantor and William Sushon of O'Melveny & Myers, LLP, of counsel for UBS.

RESPECTFULLY SUBMITTED this the 17th day of November, 2006.

/s/ David W. Clark
DAVID W. CLARK (MBN 6112)
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PRELIMINARY STATEMENT

Defendants Harvey P. White, Scot B. Jarvis, Susan G. Swenson, Thomas J. Bernard, Jeffrey P. Williams, Anthony R. Chase, Michael B. Targoff, Jill E. Barad, Robert C. Dynes, James E. Hoffmann, Stewart Douglas Hutcheson, Daniel O. Pegg and Leonard C. Stephens (collectively, the "Leap Defendants") respectfully submit this opening brief in support of their appeal of orders of the Circuit Court of Hinds County (Honorable Tomie T. Green, presiding) denying their motions to compel arbitration and stay proceedings under the Federal Arbitration Act, 9 U.S.C. § 1, or, in the alternative, to dismiss pursuant to Mississippi Rule of Civil Procedure 12(b)(6) the Original Complaint filed in *American Wireless License Group, LLC v. White,* Case No. 251-03-692 CIV ("*American Wireless*") and the First Amended and Restated Complaint filed in *Whittington v. White,* Case No. 251-03-175 CIV ("*Whittington*").

Appendix A

INTRODUCTION

The Circuit Court erred in applying the law to the Leap Defendants' motions. As discussed below, the Circuit Court should have dismissed these actions in their entirety or sent them to arbitration.

On February 7, 2001, Leap Wireless International, Inc. ("Leap") entered into an Agreement for Purchase and Sale of Licenses (the "Agreement") with American Wireless License Group, LLC ("AWG"). Pursuant to that Agreement, Leap issued approximately 1.9 million unregistered shares of Leap stock to AWG in exchange for several wireless telephone licenses held by AWG. The transaction closed on June 8, 2001. Shortly thereafter, Leap registered AWG's Leap stock with the Securities and Exchange Commission ("SEC") by filing a Form S-3 registration statement (the "June 2001 Registration Statement"). In "the fall of 2001," AWG began selling its Leap stock in the public stock market pursuant to the June 2001 Registration Statement. Several of AWG's members (the "Whittington Plaintiffs") (together with AWG, "Plaintiffs") allegedly purchased Leap stock in the public stock market "in the period following September 2001."

In June 2001 (when AWG acquired its Leap stock), Leap stock was trading at around $30.00 per share. As a result of the downturn in the telecommunications industry, the value of Leap stock began to decline. By September 2001 (when the Whittington

Plaintiffs allegedly purchased their Leap stock), the price of Leap stock had fallen to around $15.00 per share. Thereafter, the price of Leap stock continued to decline. By July 2002, Leap stock was trading below $1.00 per share. Leap eventually filed for bankruptcy in April 2003.

AWG and the Whittington Plaintiffs now have buyers' remorse. Dissatisfied with how their investment in Leap stock turned out, they filed the *American Wireless* and *Whittington* actions against the Leap Defendants in the Circuit Court of the First Judicial District of Hinds County, Mississippi. Plaintiffs claim, in hindsight, that Leap and its management (the Leap Defendants) failed to warn them that a purchase price adjustment dispute with a company named MCG PCS, Inc. ("MCG"), which also sold wireless licenses to Leap, could result in Leap paying additional amounts in Leap stock to MCG *in the future*; that Leap stock was subject to dilution *in the future*; and that additional issuances of Leap stock could trigger a default under certain of Leap's loan covenants *in the future*. Plaintiffs assert five claims for relief: under Sections 11 and 15 of the Securities Act of 1933, Sections 717(a)(2) and 719 of the Mississippi Securities Act, and common law. There are several problems with Plaintiffs' claims.

First, Plaintiffs do not have legal standing to pursue claims under Section 11 of the Securities Act of 1933 (the "1933 Act"). Section 11 provides for civil liability for issuing a false or misleading registration

statement. To have legal standing under Section 11, plaintiffs must have purchased shares that were issued and sold pursuant to the allegedly false or misleading registration statement – in this case, the June 2001 Registration Statement. By its own admission, AWG did not purchase Leap stock that was issued and sold pursuant to the June 2001 Registration Statement. Rather, AWG purchased Leap stock in a private offering that closed before the June 2001 Registration Statement was filed or became effective. With respect to the Whittington Plaintiffs, they admit that they purchased their Leap stock in the public securities market several months after Leap filed the June 2001 Registration Statement. At the times of their purchases, over 34 million shares of Leap stock were outstanding and being traded in the public market. Those shares were issued and sold pursuant to several different registration statements going back to September 1998. The Whittington Plaintiffs do not plead any facts that would suggest the shares of Leap stock they purchased were issued and sold pursuant to the June 2001 Registration Statement, as opposed to the other registration statements Leap filed over the years. Because the Whittington Plaintiffs do not (and, indeed, cannot) show that the shares they purchased were issued and sold pursuant to the June 2001 Registration Statement, they do not have standing to pursue Section 11 claims based on the allegedly false or misleading statements that appeared in that registration statement.

Second, Plaintiffs cannot show that the allegedly false or misleading statements in the June 2001 Registration Statement caused their alleged losses. Plaintiffs claim that (i) the Leap Defendants failed to disclose certain information about Leap's purchase price adjustment dispute with MCG; and (ii) their alleged losses are attributable to the "revelation" in August 2002 of an unfavorable outcome in that purchase price adjustment dispute. But AWG admits that it disposed of all of its Leap stock by December 2001, almost eight months before the Leap Defendants allegedly made the "first significant disclosures" regarding the purchase price adjustment dispute. With respect to the Whittington Plaintiffs' alleged losses, the publicly available stock records show that Leap's stock price had already fallen below $1.00 per share before the alleged "revelation" in August 2002. Under these circumstances, AWG and the Whittington Plaintiffs simply cannot show that the Leap Defendants' allegedly false or misleading statements, and the eventual disclosure of those false or misleading statements, caused their alleged losses.

Third, on the face of AWG's Original Complaint (the "AWG Complaint"), the Whittington Plaintiffs' First Amended and Restated Complaint (the "FARC"), and the documents incorporated therein, it is clear that AWG and the Whittington Plaintiffs were explicitly warned of all the risks they claim were omitted from Leap's public filings. During June 2001, Leap specifically disclosed to both AWG and the Whittington

Plaintiffs that, *inter alia*, (1) Leap had issued additional shares of stock, which would dilute the value of the Leap stock then outstanding; (2) Leap had purchased wireless licenses from MCG, and MCG was asserting in arbitration that it was entitled to a purchase price adjustment because of an alleged change in the market value of wireless licenses; (3) Leap could pay the purchase price adjustment in cash or stock, at its discretion; and (4) Leap was significantly leveraged, and its credit facilities included change of control provisions, which could trigger default if a substantial number of shares were issued. Because these are the precise risks Plaintiffs contend were omitted from the June 2001 Registration Statement, their claims fail as a matter of law. For these reasons, and others, the Circuit Court should have dismissed the *American Wireless* and *Whittington* actions in their entirety.

Even if the Circuit Court correctly denied the Leap Defendants' motions to dismiss, it nevertheless should have sent these actions to arbitration. Section 12.11 of the Agreement contains a broad arbitration clause, providing for binding arbitration of any dispute claim or controversy "arising under" the Agreement or in any way "related to" the Agreement. Based on the facts pleaded by Plaintiffs, it appears on the face of the AWG Complaint and the FARC that these actions arise under and relate to the Agreement. Specifically, Plaintiffs allege that the Leap Defendants, acting on behalf of and in concert with Leap,

induced AWG to enter into the Agreement and induced AWG to purchase Leap stock. Plaintiffs also allege that AWG entered into the Agreement on behalf of the Whittington Plaintiffs and that the Agreement was intended to benefit them individually by placing Leap stock in their hands. Finally, Plaintiffs' claims are based almost entirely on the alleged inadequacy of the risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligations under the Agreement. Thus, the Circuit Court should have compelled Plaintiffs to arbitrate their claims and stayed all proceedings in these actions pending arbitration.

The Circuit Court erred in denying the Leap Defendants' motions. This Court should remand these actions to the Circuit Court with instructions to enter orders dismissing these actions in their entirety. In the alternative, this Court should remand these actions to the Circuit Court with instructions to enter orders compelling Plaintiffs to arbitrate their claims.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Dismiss in *American Wireless*.

2. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Dismiss in *Whittington*.

3. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings in *American Wireless*.

4. Whether the Circuit Court erred in denying the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings in *Whittington*.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The *American Wireless* and *Whittington* actions are securities cases. Plaintiffs in both actions assert five claims for relief: under Sections 11 and 15 of the 1933 Act, 15 U.S.C. §§ 77k and 77o, Sections 717(a)(2) and 719 of the Mississippi Securities Act (the "MSA"), and common law. The Leap Defendants are current and former officers and directors of Leap. QUALCOMM Incorporated ("Qualcomm") is an entity that allegedly "controlled" Leap during the relevant period. Leap is not named as a defendant in *American Wireless* or *Whittington*.

II. PROCEEDINGS AND DISPOSITION BELOW

On December 31, 2002, several of the Whittington Plaintiffs filed the *Whittington* action in the Circuit Court of the First Judicial District of Hinds County against the Leap Defendants and Qualcomm.

Whitt. Rec. at 7.[1] On May 16, 2003, the Whittington Plaintiffs filed their FARC. *Id.* at 101.

On June 6, 2003, AWG filed the *American Wireless* action in the First Judicial District of Hinds County against the Leap Defendants, Qualcomm, and UBS Paine Webber, Inc. ("UBS"). AWG Rec. at 7.[2] The *American Wireless* action is virtually identical to the *Whittington* action. Both actions assert exactly the same claims, predicated on exactly the same facts.[3]

On January 28, 2005, the Leap Defendants filed motions to compel arbitration and stay proceedings, or in the alternative, to dismiss the *American Wireless* and *Whittington* actions. AWG Rec. at 1289;

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[1] References to "Whitt. Rec. at ___" are to the Appellate Record in *Whittington*.

[2] References to "AWG Rec. at ___" are to the Appellate Record in *American Wireless*. Because the *American Wireless* action is virtually identical to the *Whittington* action (*see infra*), the appellate records in these actions are virtually identical as well. For the Court's convenience, the Leap Defendants have cited to the *American Wireless* record only whenever possible.

[3] On May 29, 2003, the Leap Defendants removed the *Whittington* action to the United States District Court for the Southern District of Mississippi. Whitt. Rec. at 222-228. The Leap Defendants removed the *American Wireless* action to the Southern District of Mississippi on June 26, 2003. AWG Rec. at 88-90. On November 10, 2004, the Honorable David C. Bramlette of the United States District Court for the Southern District of Mississippi remanded the *American Wireless* and *Whittington* actions to the First Judicial District of Hinds County.

Whitt. Rec. at 514. On or about September 12, 2005, the Circuit Court denied those motions, but *sua sponte* certified its orders for interlocutory appeal. AWG Rec. at 2934, 2938; Whitt. Rec. at 1875-1878.

On September 26, 2005, the Leap Defendants appealed the Circuit Court's orders denying their motions to compel arbitration in *American Wireless* and *Whittington* (the "direct appeals"). On September 28, 2005, the Leap Defendants filed a petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *American Wireless*. On October 4, 2005, the Leap Defendants filed a petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *Whittington*. On October 14, 2005, the Leap Defendants moved to consolidate the direct appeals.

On October 21, 2005, this Court granted the Leap Defendants' motion to consolidate the direct appeals. That same day, this Court also granted the Leap Defendants' petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *American Wireless*. On October 25, 2005, this Court granted the Leap Defendants' petition for permission to appeal the Circuit Court's order denying their motion to dismiss in *Whittington*. This Court then consolidated the Leap Defendants' interlocutory appeals with their direct appeals.

III. STATEMENT OF FACTS

A. Leap

Leap was a low-cost provider of wireless telephone services in local markets across the United States.[4] AWG Rec. at 1323 (June 2001 Registration Statement). Leap conducted operations through its subsidiaries. Cricket Communications, Inc. ("Cricket") was Leap's principal operating subsidiary. Cricket offered wireless telephone services under the brand name "Cricket." Cricket service allowed customers to (i) make and receive virtually unlimited calls within a

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[4] On a motion to dismiss, the Court may consider documents relied on by plaintiffs in the complaint. *See Sennett v. United States Fidelity & Guaranty Co.*, 757 So.2d 206, 209 (Miss. 2000). The Court may also take judicial notice of and consider documents of public record such as filings with the SEC. *See* Miss. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding"); *Allyn v. Wortman*, 725 So.2d 94, 99, 103 (Miss. 1998) (considering SEC filings on motion to dismiss); *Ditto v. Hinds County*, 665 So.2d 878, 880 (Miss. 1995) (court may take judicial notice of public records). Copies of such documents were attached to (i) the Declaration of David W. Clark in Support of the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings or, in the Alternative, to Dismiss Plaintiff's Original Complaint, filed in *American Wireless*; and (ii) the Declaration of David W. Clark in Support of the Leap Defendants' Motion to Compel Arbitration and Stay Proceedings or, in the Alternative, to Dismiss Plaintiffs' First Amended and Restated Complaint, filed in *Whittington*. AWG Rec. at 1314-1317; Whitt. Rec. at 560-563. These documents were before the Circuit Court when it considered and denied the Leap Defendants' motions.

local calling area; and (ii) receive unlimited calls from any area for a flat monthly rate.

Leap was originally formed as a subsidiary of Qualcomm. AWG Rec. at 1327. In September 1998, Leap was "spun off" to be owned and operated independently of Qualcomm. *Id.* at 1327, 1360. In connection with this "spin off," Qualcomm issued and registered approximately 17 million shares of Leap stock. Between September 1998 and May 2001, Leap conducted two public offerings and issued and registered millions of additional shares of Leap stock pursuant to several different registration statements. *Id.* at 1474-1492 (cover pages of several of Leap's SEC filings, each of which reflects issuances of Leap common stock). As of June 5, 2001, approximately 34 million shares of Leap stock were outstanding. *Id.* at 1359 (June 2001 Registration Statement). Until December 2002, Leap stock traded publicly on the Nasdaq National Market under the symbol "LWIN." *Id.* at 8 (AWG Compl. ¶ 2).

Leap was subject to restrictive loan covenants during the relevant period. AWG Rec. at 1334-1336. Leap's vendor credit agreement with Ericsson Credit AB, for example, defined an event of default to include a "change of control," which would occur if an entity other than Leap acquired beneficial ownership of Leap stock representing 20% or more of the combined voting power of all Leap shares then outstanding. *Id.* at 1604, 1611-1612, 1676-1678 (Credit Agreement between Cricket Communications Holdings, Inc.,

Cricket Communications, Inc. and Ericsson Credit AB, dated October 20, 2000). Leap's vendor credit agreements with Lucent Technologies, Inc. and Nortel Networks, Inc. contained similar provisions.[5] Leap attached copies of these agreements to its SEC filings, which were themselves incorporated by reference into the June 2001 Registration Statement.[6]

B. The Leap Defendants

The Leap Defendants are current and former officers and directors of Leap or its successor in interest. *See* AWG Rec. at 1296 (Chart of Named Defendants). According to AWG and the Whittington

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[5] *See* AWG Rec. at 1777, 1784, 1849-1851 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Lucent Technologies, dated September 20, 1999, as Amended and Restated as of October 20, 2000), 2077, 2084, 2151-2153 (Credit Agreement dated as of August 28, 2000 among Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Nortel Networks, Inc.).

[6] *See* AWG Rec. at 1601-1603 (cover page and exhibit list from Leap's quarterly results on Form 10-Q for the period ended September 30, 2000, as filed with the SEC on November 14, 2000), 1776 (cover page from Leap's annual results on Form 10-K for the period ended August 31, 1999, as filed with the SEC on October 20, 1999), 2074-2076 (cover page and exhibit list from Leap's quarterly results on Form 10-Q for the period ended September 30, 2000, as filed with the SEC on November 14, 2000), 1367-1369 (June 2001 Registration Statement, incorporating by reference the aforementioned SEC filings).

Plaintiffs, the Leap Defendants acted "on behalf of," "in concert and conspiracy" with, "aided and abetted," and "carried out a plan, scheme or course of conduct" with Leap during the relevant period.[1]

C. AWG and the Whittington Plaintiffs

AWG is a Mississippi limited liability company. AWG Rec. at 8 (AWG Compl. ¶ 2). AWG owned wireless telephone licenses for certain areas in the southeastern United States, including Jackson, Mississippi, Birmingham, Alabama, Tuscaloosa, Alabama, and Jonesboro, Arkansas. In June 2001, AWG sold these licenses to Leap for approximately 1.9 million unregistered shares of Leap stock. *Id.* at 9 (AWG Compl. ¶ 3).

The Whittington Plaintiffs are alleged members of AWG (akin to owners). Whitt. Rec. at 104 (FARC ¶ 4). They allegedly purchased Leap stock in the public securities market "in the period following September 2001." *Id.* at 115-125; *see also* 104, 185-186 (FARC ¶¶ 4, 15, 105).

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[1] AWG Rec. at 65-66, 69-70, 71, 77-79, 81-83 (AWG Compl. ¶¶ 72, 76, 83, 102, 104, 109); Whitt. Rec. at 172-173, 176-177, 178, 184-186, 188-190 (FARC ¶¶ 73, 77, 84, 103, 105, 110).

D. The AWG Transaction

Leap, like all providers of wireless telephone services, had to obtain licenses to use the radio spectrum in a particular geographic area. Leap acquired many of its wireless licenses through acquisitions from existing holders. Leap frequently used its stock as consideration for these acquisitions.

One of Leap's acquisitions involved wireless licenses owned by AWG. On February 7, 2001, Leap and AWG entered into an Agreement for Purchase and Sale of Licenses (the "Agreement"), which required Leap to pay for AWG's licenses with unregistered shares of Leap stock. AWG Rec. at 9 (AWG Compl. ¶ 3), 1493, 1495, 1500-1502 (Sections 2.1, 2.2, 4.9, and 4.10 of the Agreement). Leap and AWG agreed to arbitrate "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement." AWG Rec. at 1520-1521 (Section 12.11 of the Agreement).

The AWG transaction closed on June 8, 2001. *Id.* at 50-51 (AWG Compl. ¶ 52). On that date, Leap transferred approximately 1.9 million unregistered shares of Leap stock directly to AWG. *Id.* at 9, 50-52 (AWG Compl. ¶¶ 3, 52, 54). Leap transferred those shares in a private offering that, as expressly agreed, was not subject to the registration requirements of the 1933 Act. *Id.* at 1500-1501 (Section 4.9 of the Agreement). Leap agreed to register those shares after their transfer to AWG so that AWG could sell

them in the public market at a later date. *Id.* at 1507 (Section 7.4(a) of the Agreement).

On June 11, 2001, Leap registered AWG's Leap stock with the SEC by filing the June 2001 Registration Statement. *Id.* at 51-52 (AWG Compl. ¶ 54), 1319-1321 (June 2001 Registration Statement). In the June 2001 Registration Statement, Leap disclosed:

> This prospectus relates to the offer and sale of up to 1,900,829 shares of Leap Wireless International, Inc. common stock by the selling security holder identified in this prospectus. The shares offered by this prospectus were originally issued by us to the selling security holder in connection with our acquisition of wireless licenses from the selling security holder, subject to the terms of an agreement for purchase and sale of licenses, dated February 7, 2001. Under the terms of the purchase agreement, we agreed to register for resale the shares of our common stock offered by this prospectus and bear the expenses of registration of the shares. We will not receive any of the proceeds from the sale of shares of common stock by the selling security holder.

Id. at 1321. Leap identified "American Wireless License Group, LLC" as the "selling security holder." *Id.* at 1353.

Appendix A

The June 2001 Registration Statement became effective on June 15, 2001. *Id.* at 9, 51-52 (AWG Compl. ¶¶ 4, 54). AWG allegedly began selling its Leap stock in the public stock market "during the fall of 2001," and disposed of all of its Leap stock in "piecemeal" fashion by December 2001. *Id.* at 9, 53, 78-79 (AWG Compl. ¶¶ 4, 56, 104).

The Whittington Plaintiffs allegedly began purchasing Leap stock in the public market "in the period following September 2001." Whitt Rec. at 115-125; *see also* 104, 185-186 (FARC ¶¶ 4, 15, 105). They claim they "wound up owning the [same] Leap Stock that had been owned by [AWG], had been registered for sale by Leap, and had been sold into the public market [by AWG]." *Id.* at 104 (FARC ¶ 4). According to the Whittington Plaintiffs, "[t]he plan was always for Leap to sell its Stock to the [Whittington] Plaintiffs and other [AWG] members," and Leap's filing of the June 2001 Registration Statement and AWG's subsequent sale of Leap stock in the public market were part of "an integrated series of steps" used to accomplish this. *Id.*

E. The MCG Acquisition

Plaintiffs' claims are focused on the Leap Defendants' alleged failure to disclose certain information about a brewing dispute between Leap and MCG over two wireless licenses Leap bought from MCG in 2000. AWG Rec. at 10, 51-52, 66-69 (AWG Compl. ¶¶ 6, 54,

73-74); Whitt. Rec. at 105, 157-158, 173-176 (FARC ¶¶ 6, 54, 74-75).

MCG owned wireless licenses in Buffalo and Syracuse, New York. AWG Rec. at 46 (AWG Compl. ¶ 40). In September 2000, Leap purchased MCG's wireless licenses for $18.3 million in cash and an $18 million promissory note. *Id.* at 48-49, 66-68 (AWG Compl. ¶¶ 49, 73). The MCG acquisition closed at or around the same time as the AWG transaction. *Id.* at 48-49 (AWG Compl. ¶ 49).

At or before the closing of the MCG acquisition, MCG asserted that it was entitled to a purchase price adjustment that would effectively double the purchase price for the Buffalo and Syracuse licenses. *Id.* at 1332-1333 (June 2001 Registration Statement). As a result, in the June 2001 Registration Statement, Leap disclosed:

> Under certain circumstances, the number of shares to be issued in connection with our acquisitions of wireless licenses is subject to change based on the value of wireless licenses and the market price of our common stock at the time of the closing of the acquisition. In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York that we refer to above, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. Under the terms of the

> agreement, if we are obligated to pay a purchase price adjustment, we are entitled to pay such additional amounts in cash or Leap common stock, at our discretion.

Id.

On June 15, 2001, when the June 2001 Registration Statement became effective, Leap stock was trading at approximately $30.00 per share. AWG Rec. at 49-50 (AWG Compl. ¶ 50). Accordingly, a payment of $36.3 million in Leap stock (*i.e.*, a purchase price adjustment that would have "effectively doubled" the original purchase price for the Buffalo and Syracuse licenses) would have resulted in the issuance of approximately 1.2 million shares of Leap stock, (approximately 4% of the 34 million Leap shares then outstanding). Thus, when the June 2001 Registration Statement became effective, Leap could have paid an arbitral award to MCG without violating the "change of control" provisions of its vendor credit agreements.

F. Leap's Stock Price

Like other companies in the telecommunications industry, Leap suffered during the 2001-2002 economic downturn. Decreased demand and increased competition hampered growth and flattened revenues and profits throughout the entire sector. Leap's stock price reflected these tough market conditions. On June 8, 2001, Leap stock was trading at $30.42 per share. AWG Rec. at 49-50 (AWG Compl. ¶ 50). By

August 23, 2001, it was under $18.00. *Id.* at 53-54 (AWG Compl. ¶ 57). By February 12, 2002, it fell to less than $10.00. *Id.* at 57-58 (AWG Compl. ¶ 64). By July 2002, it was trading below $1.00. *Id.* at 1537-1544 (chart of Leap's historical stock price data from March 15, 2001 through September 13, 2002 ("Stock Price Chart")).

AWG and the Whittington Plaintiffs do not allege that Leap made any corrective disclosures regarding the MCG dispute during this time period that could have accounted for this stock price decline. Rather, they claim Leap "withheld and concealed . . . at all times between the fall of 2000 and August, 2002" the "principal facts" concerning the MCG acquisition. AWG Rec. at 10 (AWG Compl. ¶ 6); Whitt. Rec. at 105 (FARC ¶ 6). Thus, Plaintiffs admit that Leap's stock price lost over 98% of its value *before* the Leap Defendants disclosed to the market the "principal facts" concerning the purchase price adjustment dispute with MCG.

G. The Outcome of the Purchase Price Adjustment Dispute

On or about August 5, 2002, the arbitrator in the purchase price adjustment dispute ruled against Leap and determined that MCG was entitled to a purchase price adjustment of $40.8 million, payable in cash or stock. AWG Rec. at 62-64 (AWG Compl. ¶ 67). Since the award was calculated in June 2002,

when Leap's stock was trading at $1.90 per share, a payment of the award in stock would have required Leap to deliver 21,548,415 shares of Leap stock to MCG. *Id.* at 62-64 (AWG Compl. ¶ 67), 1537-1544 (Stock Price Chart).

On August 14, 2002, Leap announced that it had lost the purchase price adjustment dispute with MCG and that MCG was entitled to a purchase price adjustment of $40.8 million. *Id.* at 62-64 (AWG Compl. ¶ 67). Leap informed its shareholders that, if it paid the award in stock, at the now-diminished stock price, MCG would end up owning more than 28% of Leap's outstanding common shares on a fully diluted basis, which could trigger an event of default under Leap's vendor credit agreements. *Id.* at 62.

Based on various business considerations, including that Leap believed it did not have sufficient excess cash to pay the award, Leap elected to pay the award in stock. *Id.* at 1546-1547 (excerpts from Leap's quarterly results on Form 10-Q for the period ended September 30, 2002, as filed with the SEC on November 13, 2002). In November 2002, Leap disclosed that this issuance of stock had triggered an event of default under Leap's vendor credit agreements and that Leap's vendors had ceased funding new loan requests. *Id.* at 1546. Leap also disclosed that, because of a number of factors including Leap's inability to repay its debt or raise new funds, it was substantially likely that Leap's stock had no value.

Id. Six months later, in April 2003, Leap filed for protection under the bankruptcy laws.

H. The American Wireless and Whittington Actions

On May 16, 2003, the Whittington Plaintiffs filed their FARC against the Leap Defendants and Qualcomm.[8] Whitt. Rec. at 101. The Whittington Plaintiffs' claims are focused on the Leap Defendants' alleged failure to disclose the "significant risk" that a "disastrous contractual arrangement" between Leap and MCG would result in a large arbitral award against Leap. *Id.* at 157-158 (FARC ¶ 54). The Whittington Plaintiffs allege that "the value of [their] investment in Leap Stock" was "eradicat[ed]" when the Leap Defendants finally disclosed that risk in August 2002. *Id.* at 105-106 (FARC ¶ 7). The Whittington Plaintiffs assert five claims for relief: under Sections 11 and 15 of the 1933 Act, Sections 717(a)(2) and 719 of the MSA, and common law.

On June 6, 2003, AWG, by the same counsel who filed the *Whittington* action, filed the *American Wireless* action against the Leap Defendants, Qualcomm, and

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[8] Plaintiffs allege that Qualcomm is vicariously liable for any alleged violations of state or federal law the Leap Defendants committed during the relevant period because Qualcomm allegedly "control[led]" Leap. AWG Rec. at 36-39, 72-75 (AWG Compl. ¶¶ 29, 86-92); Whitt. Rec. at 142-145, 179-182 (FARC ¶¶ 30, 87-93).

UBS.[9] AWG Rec. at 7. With the exception of replacing the Whittington Plaintiffs with AWG and adding UBS as a defendant, the AWG Complaint is identical in all material respects to the FARC. AWG's claims are predicated on exactly the same facts as the *Whittington* action. *Compare* Whitt. Rec. at 102-106, 145-171 (FARC ¶¶ 1-7, 31-70) with AWG Rec. at 7-11, 40-65 (AWG Compl. ¶¶ 1-7, 31-69).[10] AWG also has asserted exactly the same causes of action as asserted in *Whittington*. *Compare* Whitt. Rec. at 172-192 (FARC ¶¶ 71-115) *with* AWG Rec. at 65-85 (AWG Compl. ¶¶ 70-114). Finally, like the Whittington Plaintiffs, AWG's claims are focused on the Leap Defendants' alleged failure to disclose the "significant risk" that a "disastrous contractual arrangement" between Leap and MCG would result in a large arbitral award against Leap. *Compare* Whitt. Rec. at 157-158 (FARC ¶ 54) *with* AWG Rec. at 51-52 (AWG Compl. ¶ 54).

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[9] Plaintiffs allege that UBS acted as a broker for both AWG and the Whittington Plaintiffs in connection with AWG's sales of Leap stock and the Whittington Plaintiffs' subsequent purchases of Leap stock. AWG Rec. at 45-46 (AWG Compl. ¶ 39(d)); Whitt. Rec. at 151 (FARC ¶ 39(d)). Plaintiffs also allege that UBS made a number of false or misleading statements regarding Leap during the relevant period. AWG Rec. at 53-54 (AWG Compl. ¶¶ 57-58); Whitt. Rec. at 159-160 (FARC ¶¶ 57-58). AWG asserted claims against UBS. The Whittington Plaintiffs did not. The Circuit Court ordered AWG to arbitrate its claims against UBS.

[10] The AWG Complaint contains two paragraphs numbered "66." AWG Rec. at 58-62.

Appendix A

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's order denying a motion to dismiss. *See Sullivan v. Mounger,* 882 So.2d 129, 132 (Miss. 2004); *Allyn,* 725 So.2d at 98. This Court applies the same *de novo* standard to review a trial court's order denying a motion to compel arbitration. *See Terminix Int'l, Inc. v. Rice,* 904 So.2d 1051, 1054 (Miss. 2004); *McKenzie Check Advance of Miss., LLC v. Hardy,* 866 So.2d 446, 459-60 (Miss. 2004); *see also Holman Dealerships, Inc. v. Davis,* 934 So.2d 356, 358 (Miss. App. 2006).

SUMMARY OF THE ARGUMENT

The Circuit Court erred in applying the law to the Leap Defendants' motions to dismiss. As the Leap Defendants demonstrated in the trial court, Plaintiffs' claims suffer from a number of purely legal deficiencies.

First, the specific factual admissions in the AWG Complaint and the FARC demonstrate that Plaintiffs do not have legal standing to assert claims under Section 11 of the 1933 Act. AWG admits that it acquired its Leap stock in a private offering that closed *before* the June 2001 Registration Statement was filed or became effective. Thus, AWG could not have purchased stock that was issued and sold pursuant to the June 2001 Registration Statement. With respect to the Whittington Plaintiffs, they admit that they purchased their Leap stock in the public stock market

months after Leap filed the June 2001 Registration Statement. The Whittington Plaintiffs do not and cannot show that the shares they purchased were issued and sold pursuant to the June 2001 Registration Statement, as opposed to one of the other registration statements Leap filed over the years.

Second, Plaintiffs cannot show that the allegedly false or misleading statements in the June 2001 Registration Statement caused their alleged losses. Plaintiffs allege that the value of their Leap stock was "eradicated" in August 2002 when the Leap Defendants disclosed the principal facts concerning the purchase price adjustment dispute with MCG. But AWG admits that it disposed of all of its Leap stock by December 2001, eight months before the relevant disclosures were made. With respect to the Whittington Plaintiffs, they admit that Leap stock had already lost over 98% of its value by August 2002.

Third, on the face of the AWG Complaint, the FARC, and the documents incorporated therein, it is clear that the Leap Defendants disclosed the precise risks Plaintiffs contend were omitted from Leap's public filings.

Finally, with respect to Plaintiffs' claims for securities fraud under the MSA and common law, Plaintiffs fail to plead the essential element of scienter. Instead, they offer only general allegations that the Leap Defendants acted with the requisite intent. Such allegations are insufficient as a matter of law.

Appendix A

Even if the Circuit Court correctly denied the Leap Defendants' motions to dismiss, it erred in applying the law to the Leap Defendants' motions to compel arbitration. At the outset, there can be no doubt that the FAA applies to the Agreement between Leap and AWG. The FAA applies to written arbitration provisions in contracts evidencing transactions in interstate commerce. Here, the Agreement evidences a transaction in interstate commerce because it involves the securities industry. Likewise, the *American Wireless* and *Whittington* actions are within the scope of the arbitration provision in the Agreement. These actions arise under and relate to the Agreement because they involve the principal transaction underlying the Agreement: Leap's issuance of stock to AWG in exchange for AWG's wireless licenses. These actions also involve the adequacy of the risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligations under the Agreement.

Furthermore, the Leap Defendants are entitled to enforce the arbitration provision even though they did not sign the Agreement. Under the doctrine of equitable estoppel, non-signatory defendants may enforce an arbitration clause when, *inter alia,* plaintiffs allege substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories. Here, the *American Wireless* and *Whittington* actions are based on the allegation that Leap and the Leap Defendants acted in

concert to induce AWG and the Whittington Plaintiffs to exchange AWG's wireless licenses for Leap stock. Plaintiffs refer to Leap as a "Co-Conspirator" and allege that the Leap Defendants acted "in concert and conspiracy with" Leap.

Finally, the Whittington Plaintiffs can be compelled to arbitrate their claims even though they did not sign the Agreement. It is well settled that nonsignatory plaintiffs are estopped from refusing to comply with an arbitration clause when they receive a direct benefit from the contract containing the arbitration clause. Here, the FARC rests on the allegation that the transaction between Leap and AWG that was reflected in the Agreement was intended to benefit the Whittington Plaintiffs individually by placing Leap stock in their hands. The Whittington Plaintiffs further allege that they actually purchased in the public market the same Leap stock that Leap issued to AWG pursuant to the Agreement.

For the foregoing reasons, and as discussed more fully below, the Circuit Court erred in applying the law to the Leap Defendants' motions. The Circuit Court's orders should be reversed.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTIONS TO DISMISS

In the Circuit Court, the Leap Defendants moved under Mississippi Rule of Civil Procedure 12(b)(6) for an order dismissing both the AWG Complaint and the FARC for failure to state a claim upon which relief can be granted. On a Rule 12(b)(6) motion to dismiss, courts consider the allegations in the complaint and documents incorporated by reference therein. *See Sennett,* 757 So.2d at 209. Courts may also take judicial notice of and consider documents of public record. *Allyn,* 725 So.2d at 98.

A. The Circuit Court Should Have Dismissed Plaintiffs' Section 11 Claims

Both AWG and the Whittington Plaintiffs assert claims for relief under Section 11 of the 1933 Act.[11] Section 11 provides, in relevant part:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person

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[11] State and federal courts have concurrent jurisdiction over claims brought under the 1933 Act. *See* 15 U.S.C. § 77v(a).

> acquiring such security . . . may, either at law or in equity, in *any* court of competent jurisdiction, sue.

15 U.S.C. § 77k(a). For the reasons set forth below, Plaintiffs' Section 11 claims fail as a matter of law and the Circuit Court should have dismissed them.

1. Plaintiffs lack legal standing to assert claims under Section 11

Plaintiffs cannot, as a matter of law, pursue claims under Section because they lack legal standing under that section of the 1933 Act.

The 1933 Act regulates public offerings of securities. *See Gustafson v. Alloyd Co.,* 513 U.S. 561, 571-72 (1995). It is a far narrower statute than the Securities Exchange Act of 1934 (the "1934 Act"); unlike the 1934 Act, the 1933 Act is "chiefly concerned with disclosure and fraud in connection with offerings of securities – primarily . . . initial distributions of newly issued stock from corporate issuers." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 752 (1975) (citation omitted).

Section 11 of the 1933 Act provides for civil liability for issuing a false or misleading registration statement. 15 U.S.C. § 77k(a). It provides relief to "any person acquiring such security." *Id.* "'[T]he natural reading of 'any person acquiring such security' is . . . that the buyer must have purchased a security issued under the registration statement at

issue, rather than some other registration statement.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003), quoting *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999); *accord Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000). Thus, Section 11's standing provisions limit putative plaintiffs to the narrow class of persons who purchased the actual "shares issued and sold pursuant to the challenged registration statement." *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 223 (5th Cir. 1994); *see also Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976-77 (8th Cir. 2002) (Section 11 standing is limited to persons who purchase "a security that was originally registered under the allegedly defective registration statement, so long as the security was indeed issued under *that* registration statement and not another."). Courts dismiss Section 11 claims where plaintiffs fail to allege facts showing they have proper standing. *See, e.g., Davidco Investors, LLC v. Anchor Glass Container Corp.*, [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,732, at 98,448-449 (M.D. Fla. Mar. 3, 2006); *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832, 864 (N.D. Tex. 2005); *Moskowitz v. Mitcham Indus.*, No. CIV. A. 98-1244, 1999 WL 33606197, at *20 (S.D. Tex. Sept. 29, 1999).

Appendix A

a. AWG did not purchase Leap stock pursuant to the June 2001 Registration Statement

AWG alleges that it purchased Leap stock pursuant to the June 2001 Registration Statement. AWG Rec. at 75-76 (AWG Compl. ¶ 95). That conclusory assertion, however, is directly contradicted by the factual allegations in the AWG Complaint. As alleged in the AWG Complaint, Leap issued 1,900,829 shares of Leap stock to AWG on June 8, 2001. *Id.* at 9, 50-51 (AWG Compl. ¶¶ 3, 52). Leap issued and "sold" those shares to AWG in a private offering that was not subject to 'the registration requirements of the 1933 Act. *Id.* at 1500-1501 (Section 4.9 of the Agreement). As AWG expressly "acknowledge[d] and agree[d]" in its Agreement with Leap, "the Leap shares have not been registered under the Securities Act [of 1933], or under any state securities laws, and are being offered and sold in reliance upon federal and state exemptions for transactions not involving any public offering." *Id.* at 1501-1502 (Section 4.10 of the Agreement); *see also id.* at 1495, 1500-1501 (Sections 2.2 and 4.9 of the Agreement).

On June 11, 2001, three days ***after*** AWG acquired its Leap stock in the private offering, Leap filed the June 2001 Registration Statement. Leap did so for the express purpose of enabling AWG to ***sell*** its Leap shares in the public market. *Id.* at 44 (AWG Compl. ¶ 38(h)) ("Leap agreed, within 30 days after the Closing, to file with the SEC a registration statement

under the federal Securities Act of 1933 . . . which would permit [AWG] to resell the above-mentioned Leap Stock to the public."); *see also id.* at 1507 (Section 7.4(a) of the Agreement). In the June 2001 Registration Statement, Leap explained that (i) AWG already owned the shares that were being offered for sale; (ii) the shares that were being offered for sale "were originally issued by [Leap] to [AWG] in connection with [Leap's] acquisition of wireless licenses;" and (iii) the shares were being offered for sale by AWG, ***not Leap***. *Id.* at 1321, 1354. The June 2001 Registration Statement became effective on June 15, 2001, seven days ***after*** AWG acquired its Leap stock in the earlier private offering. *Id.* at 9, 50-52 (AWG Compl. ¶¶ 3, 4, 52, 54).

The allegations in the AWG Complaint and the structure of the transaction between Leap and AWG establish conclusively that AWG did not purchase Leap stock pursuant to the June 2001 Registration Statement. Rather, AWG acquired its Leap stock in a private offering that occurred before the June 2001 Registration Statement was filed or became effective. Thus, AWG could not have purchased Leap stock that was issued and sold pursuant to the June 2001 Registration Statement. Under these circumstances, AWG simply cannot establish that it has standing to assert a claim under Section 11. *See Turner v. First Wisconsin Mortgage Trust,* 454 F. Supp. 899, 911 (E.D. Wis. 1978) (plaintiff who purchased her shares in August of 1972 "obviously" could not prove that she had

standing to pursue a Section 11 claim for an allegedly false registration statement that was filed in February of 1973); *In re Penn Cent. Sec. Litig.*, 357 F. Supp. 869, 877 (E.D. Pa. 1973) ("open market sellers" do not have standing under Section 11), *aff'd*, 494 F.2d 528 (3d Cir. 1974).[12]

b. The Whittington Plaintiffs cannot "trace" their Leap stock to the June 2001 Registration Statement

By their own admission, the Whittington Plaintiffs did not acquire their shares directly from Leap. Rather, they purchased their Leap stock "in the public market" months after Leap filed the June 2001

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[12] In the Circuit Court, AWG argued that it has standing to pursue a Section 11 claim because it "did not purchase *all* of its [Leap] shares before the [June 2001] Registration Statement was filed." AWG Rec. at 2665 (AWG's Opposition to the Leap Defendants' Motion to Dismiss) (emphasis added). Specifically, AWG asserted that it purchased "190,083 shares of Leap Stock [during] June 2002 and these shares would have been purchased pursuant to the [June 2001] Registration Statement." *Id.* Because this assertion appears nowhere in the AWG Complaint, it cannot provide a basis for Section 11 standing. Moreover, the AWG Complaint fails to plead any facts that would suggest these "190,083 shares of Leap Stock" were issued and sold pursuant to the June 2001 Registration Statement. *See Davidco Investors*, [2006-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,448 (dismissing complaint for lack of standing; "[i]n order to have standing to sue under § 11, a plaintiff must show that his shares were issued pursuant to the particular registration statement alleged to be defective.").

Registration Statement. Whitt. Rec. at 104, 115-125, 185-186 (FARC ¶¶ 4, 15, 105). At the times of their purchases, over 34 million shares of Leap stock were outstanding and being traded in the public market. AWG Rec. at 1332 (June 2001 Registration Statement). Those shares were issued pursuant to several different registration statements going back to September 1998. Whit Rec. at 572-590 (cover pages of several of Leap's SEC filings, each of which reflects issuances of Leap common stock). The number of Leap shares registered pursuant to the June 2001 Registration Statement was approximately 5½% of the total number of Leap shares then outstanding. AWG Rec. at 1332 (June 2001 Registration Statement). Thus when the Whittington Plaintiffs purchased their Leap stock, they had (at most) a 5½% chance of acquiring shares that were issued and sold pursuant to the June 2001 Registration Statement.

The Whittington Plaintiffs nevertheless contend they can "trace" their shares to the June 2001 Registration Statement because they purchased their Leap stock in the public market at around the same time that AWG was selling its Leap shares in the public market. Whitt. Rec. at 104, 150-152, 158-159, 172-173, 182-183 (FARC ¶¶ 4, 39, 56, 73, 96). The Fifth Circuit recently rejected a similar attempt at "tracing" in *Krim v. pcOrder.com*. In *Krim*, the Fifth Circuit held that plaintiffs cannot rely on "statistical tracing" to establish standing for purposes of Section 11. *See* 402 F.3d 489, 496-97 (5th Cir. 2005). In that

case, pcOrder.com issued roughly 2.5 million shares of stock in an initial public offering (the "IPO"). Shortly thereafter, certain pcOrder insiders sold their "insider shares" into the public market. pcOrder issued a small number of additional shares in a secondary offering (the "SPO") later that year. When plaintiffs purchased their shares, the IPO and SPO shares constituted 91% of the outstanding shares in the public market; the insider shares comprised the remaining 9%. Plaintiffs filed an action alleging that the registration statements for the IPO and SPO were false and misleading. The Fifth Circuit found that while plaintiffs had a high probability of having purchased stock that was issued and sold pursuant to the registration statements for the IPO or the SPO, there was a chance (however slight) that they had purchased "insider shares." The Court found that even this slight chance that plaintiffs had not purchased shares issued and sold pursuant to the challenged registration statements prohibited them from pursuing Section 11 claims. *Id.* at 500-02. The Court explained:

> Congress conferred standing on those who *actually* purchased the tainted stock, not on the whole class of those who *possibly* purchased tainted shares – or, to put it another way, are at risk of having purchased the tainted shares . . . Appellants here cannot meet the statutory standing requirement of Section 11 merely be showing that they

> jumped into a potentially polluted 'pool' of stock.

Id. at 500; *see also id.* at 497 ("In limiting those who can sue to 'any person acquiring such security,' Congress specifically conferred standing on a subset of security owners . . . To allow Appellants to satisfy the tracing requirement for aftermarket standing in this case with the proffered statistical methodology would contravene the language and intent of Section 11.").

Courts in other jurisdictions have similarly rejected "statistical tracing" as a basis for establishing Section 11 standing. *See, e.g., Davidco Investors,* [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,448-449 ("standing cannot be based on a statistical tracing theory, i.e., by showing that there is a *very high probability* that the shares can be traced to the allegedly defective registration statement."); *In re Quarterdeck Office Sys., Inc. Sec. Litig.,* [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,092, at 98,743 (C.D. Cal. Sept. 30, 1993) ("[c]ourts have uniformly interpreted [Section] 11 as requiring more than a showing that a plaintiff's stock 'might' have come from the relevant offering") (citation omitted).

Here, because the Whittington Plaintiffs purchased their Leap shares in "the public market" (*see* Whitt. Rec. at 104, 115-125, 186-186 (FARC ¶ 4, 15, 105)), they cannot establish with certainty that the particular shares they purchased were issued and sold pursuant to the June 2001 Registration Statement, as

opposed to the other registration statements Leap filed over the years. Notably, the Whittington Plaintiffs have a much weaker case than the plaintiffs in *Krim*. In *Krim*, plaintiffs had at least a 90% probability of having purchased shares that were issued pursuant to the allegedly misleading registration statements. *See Krim*, 402 F.3d at 492. If a 90% likelihood does not provide sufficient certainty to support standing, surely a 5½% chance cannot support the Whittington Plaintiffs' standing here. *See Alamosa Holdings, Inc.*, 382 F. Supp. 2d at 864 ("mere probability that a plaintiff can trace shares is clearly insufficient" for Section 11 standing).

In the Circuit Court, the Whittington Plaintiffs argued that the issue of Section 11 standing "*is a fact-intensive inquiry which cannot be resolved on a preliminary dismissal motion, where no discovery has yet occurred.*" Whitt. Rec. at 1640 (Whittington Plaintiffs' Opposition to the Lead Defendants' Motion to Dismiss) (emphasis in original). That is not an accurate statement of the law. Indeed, the United States District Court for the Middle District of Florida recently rejected a similar argument in *Davidco Investors*. In that case, plaintiff argued that the issue of Section 11 standing is "beyond the scope of a motion to dismiss." [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,449. Relying on the Fifth Circuit's decision in *Krim*, the Court rejected plaintiff's argument and held that "standing is an element of subject matter jurisdiction, which may be determined

on a motion to dismiss." *Id.* The Court then dismissed plaintiff's Section 11 claim because he "offered no evidence in support of his contention that the shares that he purchased are traceable to the prospectus." *Id.* Similarly, in *Alamosa Holdings,* the United States District Court for the Northern District of Texas dismissed plaintiff's Section 11 claim because the Court was "unable to locate any specific allegation that the Lead Plaintiff purchased traceable shares or any facts to support such an allegation." 382 F. Supp. 2d at 864. The Circuit Court should have dismissed the Whittington Plaintiffs' Section 11 claims for the same reason.[13]

2. American Wireless Cannot Demonstrate That Its Alleged Losses Were Caused By the Leap Defendants

AWG cannot, as a matter of law, demonstrate that its alleged losses were caused by the Leap Defendants. Section 11(e) limits a plaintiff's damages to

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[13] It is worth noting that all of the facts bearing on whether the Whittington Plaintiffs can demonstrate standing for purposes of Section 11 are solely within the possession of the Whittington Plaintiffs. The Leap Defendants do not know and could not reasonably be expected to know whether the shares of Leap stock the Whittington Plaintiffs allegedly purchased in the open market were or were not issued and sold pursuant to the June 2001 Registration Statement. Thus, no amount of discovery from the Leap Defendants can help the Whittington Plaintiffs in satisfying this essential element of their claims.

the difference between the offering price and the value of the security when the suit was filed or when the security was sold. 15 U.S.C. § 77k(e). The statute also provides an affirmative defense known as "negative causation." Specifically, Section 11(e) provides:

> [I]f the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable.

Thus, where defendants can show that factors other than the alleged omissions in the registration statement caused the depreciation in the stock price, plaintiffs have no claim. *See id.*

Although "negative causation" is ordinarily raised as an affirmative defense, courts have considered such arguments on a motion to dismiss where the facts are beyond dispute. *See Alamosa Holdings,* 382 F. Supp. 2d at 865 ("If the negative causation defense is apparent on the face of a complaint, dismissal . . . of the Section 11 claim is proper."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* 289 F. Supp. 2d 429, 437 (S.D.N.Y. 2003) ("Where it is apparent from the face of the complaint that the plaintiff cannot recover her alleged losses, dismissal

of the complaint . . . is proper."); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248 (N.D. Cal. 2000) (dismissing Section 11 claim where it was clear on the face of the complaint that certain plaintiffs could not establish that defendants' alleged misstatements caused their damages).

Here, it is readily apparent that the Leap Defendants' alleged omissions did not cause AWG's alleged losses. AWG alleges that its losses were "[t]he direct result of the eventual disclosures of the [allegedly] concealed facts" regarding the MCG transaction, and that these "eventual disclosures" were made "in August 2002." AWG Rec. at 10, 64 (AWG Compl. ¶¶ 7, 68). However, AWG also alleges that it disposed of all its Leap stock by December 2001. AWG Rec. at 53 (AWG Compl. ¶ 56). Obviously, the Leap Defendants' alleged omissions and the August 2002 disclosure of those omissions could not have had any negative affect on the value of AWG's Leap stock when AWG disposed of all its shares ***eight months before the relevant disclosures were even made***. AWG Rec. at 9, 53, 62-64 (AWG Compl. ¶¶ 4, 56, 67). Under these circumstances, AWG cannot show that it suffered any damages as a result of the Leap Defendants' alleged omissions. *See McKesson HBOC*, 126 F. Supp. 2d at 1262 (plaintiffs who sold their stock prior to corrective disclosures could not show that defendants' alleged misstatements caused their damages). For this additional reason, the Circuit Court should have dismissed AWG's Section 11 claim.

3. Leap Disclosed the Risks Plaintiffs Claim Were Omitted from the June 2001 Registration Statement

To state a Section 11 claim, plaintiffs must allege that a registration statement contained a material misrepresentation or omission. *See* 15 U.S.C. § 77k(a). A misrepresentation or omission is material if "it would have misled a reasonable investor about the nature of his or her investment." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403-04 (9th Cir. 1996) (citation omitted). A court can asses the adequacy or materiality of a statement or omission at the pleading stage if it is "so obvious that reasonable minds could not differ." *Id.* at 1405; *see also Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 216 (5th Cir. 2004) ("[a]ppellants claim that materiality should be a question of fact for the jury, but many Section 11 cases have been properly dismissed on the pleadings for lack of materiality").

It is well established that a Section 11 claim must be dismissed where defendants disclose the precise risks that plaintiffs claim were omitted. *See Melder v. Morris*, 27 F.3d 1097, 1100-01 (5th Cir. 1994) (dismissing Section 11 claim where prospectuses disclosed risks plaintiff asserted were omitted); *see also Olkey v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 5 (2d Cir. 1996) (dismissing Section 11 claim where "[t]he prospectuses warn investors of exactly the risk plaintiffs claim was not disclosed."); *Hinerfeld v. United Auto Group*, [1998 Transfer Binder]

Fed. Sec. L. Rep. (CCH) ¶ 90,264, at 91,167 (S.D.N.Y. July 15, 1998) ("Courts will dismiss claims under [Section 11] if they charge omissions of what was in fact disclosed. . . . If the plaintiffs' claims of misleading disclosures are contradicted by disclosures made on the face of the prospectus, then no additional facts can prove the claims and dismissal is proper.").

Here, Plaintiffs allege that the June 2001 Registration Statement was false and misleading because the Leap Defendants failed to disclose the risks associated with the MCG acquisition and the potential consequences of an adverse finding in the MCG arbitration. AWG Rec. at 51-52 (AWG Compl. ¶ 54); Whitt. Rec. at 157-158 (FARC ¶ 54). Leap disclosed these risks.

a. Leap disclosed that additional share issuances would dilute the value of Leap stock

Plaintiffs allege that the Leap Defendants failed to disclose the risks that "would bear on dilution of [AWG's] equity and other holders' equity in Leap." AWG Rec. at 52 (AWG Compl. ¶ 54); Whittington Rec. at 157 (FARC ¶ 54). The June 2001 Registration Statement included a boldfaced, all-capital-lettered warning: **"YOUR OWNERSHIP INTEREST IN LEAP WILL BE DILUTED UPON ISSUANCE OF SHARES WE HAVE RESERVED FOR FUTURE ISSUANCE."** AWG Rec. at 1332. In the June 2001 Registration Statement, Leap told its investors that

34,079,432 shares of its stock was then outstanding and that it had reserved for future issuance 22,633,849 additional shares. *Id.* Leap added, "[t]he issuance of these additional shares will reduce your percentage ownership in Leap." *Id.* Leap also expressly warned that, if the value of wireless licenses increased or if the price of Leap stock decreased, Leap might have to issue more shares of stock to acquire wireless licenses. *Id.*

Leap also made clear that additional share issuances could cause the market price of Leap stock to decline. Leap stated: "Dilution of the outstanding number of shares of our common stock could adversely affect prevailing market prices for our common stock." *Id.* at 1334. Consequently, in the June 2001 Registration Statement, Leap apprised Plaintiffs that Leap would issue more shares, that these stock issuances would dilute the market value of Plaintiffs' shares, and this dilution could cause Leap to issue more shares. *Id.*

b. Leap disclosed the potential consequences of its dispute with MCG

Plaintiffs contend that the Leap Defendants failed to disclose "the amount of shares . . . that Leap would have to deliver to fulfill such 'adjustments' to MCG" and "the risks and consequences that would flow from" such a purchase price adjustment. AWG Rec. at 52 (AWG Compl. ¶ 54); Whitt. Rec. at 157

(FARC ¶ 54). At the outset, it bears noting that there is no way the Leap Defendants could have calculated the amount of shares that Leap would have to deliver to MCG since the amount would depend on the value of Leap stock at the time of the award. Leap disclosed, however, that the purchase price adjustment MCG was seeking would effectively "double" the purchase price of the transaction and that Leap might pay this adjustment in stock:

> In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York that we refer to above, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, *it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled.* Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we are entitled to pay such additional amounts *in cash or Leap common stock* at our discretion."

AWG Rec. at 1332-1333 (June 2001 Registration Statement) (emphasis added).

Accordingly, in the June 2001 Registration Statement, Leap warned Plaintiffs that Leap might have to pay a large purchase price adjustment in Leap stock as a consequence of the MCG dispute. Plaintiffs were also put on notice that any such purchase price adjustment could dilute the value of Plaintiffs' holdings of Leap stock and (for the reasons discussed

below) potentially could trigger a default under Leap's "lending and financing arrangements."

c. Leap disclosed that it was subject to restrictive loan covenants and additional share issuances could trigger an event of default

Plaintiffs claim that the Leap Defendants failed to disclose that the purchase price adjustment dispute with MCG created a "significant risk that Leap's covenants in its lending and financing arrangements would be violated." AWG Rec. at 52 (AWG Compl. ¶ 54); Whitt. Rec. at 157-158 (FARC ¶ 54). The June 2001 Registration Statement contained a boldfaced, all-capital-lettered warning: **"HIGH LEVELS OF DEBT COULD ADVERSELY AFFECT OUR BUSINESS AND FINANCIAL CONDITION."** AWG Rec. at 1334. As of March 31, 2001, Leap's long-term debt was almost $900 million. *Id.* at 1550 (Leap's quarterly results on Form 10-Q for period ended March 31, 2001, as filed with the SEC on May 15, 2001). Leap also disclosed that certain of Leap's senior debt obligations required Leap to maintain certain ratios and satisfy certain tests. *Id.* at 1334-1336 (June 2001 Registration Statement). Leap warned that its failure to satisfy these tests could mean it would be in default under its senior debt and be unable to make payments under its outstanding notes: "Any defaults that result in a suspension of further borrowings under the vendor facilities or

acceleration of our obligations to repay the outstanding balances under the vendor facilities would have a material adverse effect on our business and our financial condition." *Id.* at 1336. As noted, the precise vendor credit agreements to which Leap referred were attached to Leap's SEC filings, which were themselves incorporated by reference into the June 2001 Registration Statement. *See supra* at 8 & n.5, n.6. Those credit agreements defined an event of default to include a "change of control," which would occur if an entity other than Leap acquired beneficial ownership of Leap stock representing 20% or more of the combined voting power of all Leap shares.[14]

In sum, the June 2001 Registration Statement specifically disclosed that:

- Leap stock would be diluted whenever Leap issued more shares;
- The dispute with MCG could result in Leap's having to pay double the purchase price in Leap stock; and

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[14] *See* AWG Rec. at 1604, 1611-1612, 1676-1678 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc., and Ericsson Credit AB, dated October 20, 2000), 1777, 1784, 1849-1850 (Credit Agreement between Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Lucent Technologies, dated September 20, 1999, as Amended and Restated as of October 20, 2000), and 2077, 2084, 2151-2153 (Credit Agreement dated as of August 28, 2000 among Cricket Communications Holdings, Inc., Cricket Communications, Inc. and Nortel Networks, Inc.).

- Leap had a significant debt load and was obligated to comply with restrictive loan covenants, one of which prohibited any entity other than Leap from owning 20% or more of Leap's stock.

Leap and MCG were only in the early stages of the purchase price adjustment dispute when the Leap Defendants were issuing these warnings. At the time, Leap stock was trading at approximately $30.00 per share. Plaintiffs are effectively accusing the Leap Defendants of failing to predict in June 2001 that, over one year later (in August 2002), there would be an unfortunate confluence of negative events – *i.e.*, Leap would lose the purchase price adjustment dispute with MCG in its entirety, Leap would not have sufficient cash to pay the purchase price adjustment to MCG, and Leap stock would be trading at less $1.00 per share. Nobody could have predicted these events. Nor do the federal securities laws require such prediction. *See Stac,* 89 F.3d at 1406 ("[A] company is not required to forecast future events"). They require only the disclosure of material facts. Since Plaintiffs fail to allege the omission of any such facts, their Section 11 claims fail as a matter of law and should have been dismissed. *Cf. City of Philadelphia v. Fleming Cos., 264* F.3d 1245, 1268 (10th Cir. 2001) (dismissing claim under Section 10(b) of the 1934 Act where defendants failed to disclose the existence of a lawsuit that resulted in a large verdict against the company; "we cannot find Defendants liable [for securities fraud] for failing to anticipate the full

extent of their potential exposure in the David's litigation").

B. The Circuit Court Should Have Dismissed Plaintiffs' Section 15 Claims

Both AWG and the Whittington Plaintiffs assert claims under Section 15 of the 1933 Act. Section 15, entitled "Liability of Controlling Persons," provides, in relevant part, that "[e]very person who . . . controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . " 15 U.S.C. § 77o.

A prerequisite to a finding of controlling person liability under Section 15 is a finding that the controlled person violated Sections 11 or 12 of the 1934 Act. *See Kapps*, 379 F.3d at 221; *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 508-09 (5th Cir. 1990). Since Plaintiffs cannot state a claim under Section 11 (*see supra* at 17-29), dismissal of their Section 11 claims also requires dismissal of their Section 15 control person liability claims. *See, e.g., R2 Invs. LDC v. Phillips*, 401 F.3d 638, 641 (5th Cir. 2005) (control person liability may not be imposed absent an underlying violation).

Even if Plaintiffs had pleaded adequately a primary violation of the 1933 Act (they have not),

their control person allegations against certain of the Leap Defendants fail. In particular, Plaintiffs assert Section 15 claims against former outside directors of Leap (Messrs. Jarvis, Targoff, Dynes, Williams, Chase and Ms. Barad). AWG Rec. at 21-23, 26-32 (AWG Compl. ¶¶ 17, 20-24); Whitt. Rec. at 127-129, 132-138 (FARC ¶¶ 18, 21-25). The only facts Plaintiffs have alleged to support Section 15 controlling person liability against these individuals are (a) they were members of the board of Leap (but *not* also officers) and (b) they held small amounts of Leap stock. AWG Rec. at 21-23, 26-32 (AWG Compl. ¶¶ 17, 20-24); Whitt. Rec. at 127-129, 132-138 (FARC ¶¶ 18, 21-25). As a matter of law, these facts are insufficient to state a claim for controlling person liability. *See Dennis,* 918 F.2d at 509-10 (status as director, minority stock ownership insufficient); *Sloane Overseas Fund, Ltd v. Sapiens Int'l Corp.,* 941 F. Supp. 1369, 1378 (S.D.N.Y. 1996) ("Director status alone does not establish control person liability" under Section 20 of the 1934 Act; 8% stock ownership insufficient).[15]

Similarly, Plaintiffs attempt to state a Section 15 claim against Leap's Senior Vice Presidents of Public Affairs (Mr. Pegg) and Human Resources (Mr. Stephens). Here, too, Plaintiffs allege nothing about

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[15] Section 15 and its analogue in the 1934 Act, Section 20(a), are interpreted identically. *See Pharo v. Smith,* 621 F.2d 656, 673 (5th Cir.), *aff'd in relevant part,* 625 F.2d 1226 (5th Cir. 1980).

these individuals other than they were officers of Leap who held small amounts of Leap stock. AWG Rec. at 34-36 (AWG Compl. ¶¶ 27-28); Whitt. Rec. at 141-142 (FARC ¶¶ 28-29). These facts are not enough to support a Section 15 claim. *See, e.g., Dennis,* 918 F.2d at 509-10 (nominal stock ownership insufficient). Furthermore, Messrs. Pegg's and Stephens' positions in "public affairs" and "human resources," respectively, suggest that these individuals would not have been involved in the acts and transactions alleged in this case, let alone would have exercised control over any person allegedly liable under Section 11. *See Cohen v. Citibank N.A.,* 954 F. Supp. 621, 629 (S.D.N.Y. 1996) (pleading legal conclusions or a defendant's mere status – *i.e.,* that the defendant "[wa]s a corporate officer, director, or shareholder" – is insufficient). Accordingly, the Circuit Court should have dismissed the Section 15 claims against Messrs. Jarvis, Targoff, Dynes, Williams, Chase, Pegg, Stephens and Ms. Barad.

C. The Circuit Court Should Have Dismissed Plaintiffs' State Law Claims

Both AWG and the Whittington Plaintiffs assert fraud claims under Section 717(a)(2) of the MSA and common law. To state a claim under Section 717(a)(2) or common law, plaintiff must plead that defendants intentionally made untrue statements or omissions of material fact which plaintiff relied upon and which

caused plaintiff's losses. *See* Miss. Code Ann. § 75-71-717(a)(2) (requiring an "untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made . . . not misleading"); *Geisenberger v. John Hancock Distribs., Inc.*, 774 F. Supp. 1045, 1051 (S.D. Miss. 1991) (Section 717(a)(2) "contain[s] an implicit requirement of reasonable reliance"); *Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So.2d 331, 343 (Miss. 2004) (setting forth elements to establish common law fraud); *Russell v. S. Nat'l Foods, Inc.*, 754 So.2d 1246, 1256 (Miss. 2000) (plaintiff asserting claims under the MSA must show proximate causation and "intentional or deceptive conduct"). As discussed more fully below, Plaintiffs fail to allege facts to support key elements of these claims.

1. The Allegedly Omitted Information Could Not Have Caused Plaintiffs' Losses

A plaintiff asserting claims under Section 717(a)(2) or common law fraud must plead facts showing that the defendants' alleged misrepresentations or omissions "'touched upon' the reasons for [plaintiff's] loss or caused the loss itself in some reasonably direct way." *Geisenberger*, 774 F. Supp. at 1051 ("loss causation" required under Section 717(a)(2) of the MSA); *see Russell*, 754 So.2d at 1256 (plaintiff asserting claims based on the MSA and common law fraud must show proximate cause). Here, Plaintiffs have

not pleaded adequately that the Leap Defendants' alleged omissions caused their alleged losses.

AWG alleges that its losses were "[t]he direct result of the eventual disclosures of the [allegedly] concealed facts" regarding the MCG transaction, and that these "eventual disclosures" were made "in August 2002." AWG Rec. at 10-11, 64 (AWG Compl. ¶¶ 7, 68). However, AWG also alleges that it had disposed of all its Leap stock by December 2001. AWG Rec. at 53 (AWG Compl. ¶ 56). Obviously, the Leap Defendants' alleged omissions and the August 2002 disclosure of those omissions could not have had any negative affect on the value of AWG's Leap stock when AWG disposed of all its shares eight months before the relevant disclosures were even made. AWG Rec. at 9, 53, 62-64 (AWG Compl. ¶¶ 4, 56, 67). Under these circumstances, AWG cannot show that it suffered any damages as a result of the Leap Defendants' alleged omissions. *See Arduni/Messina P'ship v. Nat'l Med. Fin. Servs. Corp.*, 74 F. Supp. 2d 352, 361-362 (S.D.N.Y. 1999) (plaintiffs who sold their stock before the defendants' allegedly fraudulent scheme was disclosed could not establish "loss causation"). Accordingly, AWG cannot plead or prove loss causation and its claims should have been dismissed.

With respect to the Whittington Plaintiffs, they claim that the Leap Defendants' alleged omissions caused Leap's stock price to be inflated during the relevant period and that the price of Leap's stock came crashing down to $0.30 a share once the "truth"

was revealed on August 14, 2002. *See* Whitt. Rec. at 105-106, 155, 170-171 (FARC ¶¶ 7, 50, 69). However, the Whittington Plaintiffs concede that Leap's stock price had already lost ***over 98% of its value*** by August 13, 2001 (the day before the alleged "truth" was revealed to the market).[16] Under these circumstances, it is evident that the Leap Defendants' alleged omissions did not cause the decline in Leap's stock price. Accordingly, the Whittington Plaintiffs cannot plead or prove loss causation and their claims should be dismissed. *See Bastian v. Petren Res. Corp.*, 892 F.2d 680, 684-85 (7th Cir. 1990) (dismissing complaint where it was apparent that market forces, not defendants' misstatements, caused plaintiffs' alleged losses).

The Southern District of New York's decision in *Merrill Lynch* is on point. In that case, plaintiffs filed suit against a Merrill Lynch mutual fund, claiming that the defendants failed to disclose in the registration statements for the mutual fund conflicts of interest between the fund and certain Merrill Lynch analysts. Plaintiffs alleged that the value of the mutual fund declined when these conflicts were subsequently disclosed to the public on April 8, 2002

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[16] The Whittington Plaintiffs concede that Leap's stock fell from $30.42 to $17.44 between June 8, 2001 and August 23, 2001, from $17.44 to $9.42 between August 23, 2001 and February 12, 2002, and from $9.42 to $0.55 between February 12, 2002 and August 13, 2002. *See* Whitt. Rec. at 155, 159, 163, 168-170 (FARC ¶¶ 50, 57, 64, 68).

(when the New York Attorney General filed a complaint against Merrill Lynch in connection with these alleged conflicts). Plaintiffs also alleged, however, that the mutual fund had lost over 74% of its value by March 31, 2001 (over one-year *before* the disclosure of the allegedly concealed conflicts). 289 F. Supp. 2d at 437. The Court dismissed plaintiffs' claims on the grounds that they, *inter alia,* failed to plead adequately that the defendants' alleged omissions caused their losses. The Court explained: "'[P]rice decline before disclosure may not he charged to defendants.'" *Id.*; *see also Alamosa,* 382 F. Supp. 2d at 865 ("As a general rule price decline before disclosure of the truth may not be charged to defendants.") (citation omitted).

As explained above, the FARC demonstrates that the alleged failure to disclose the risks associated with the MCG dispute was not the cause of Leap's share price decline, and thus not the cause of the Whittington Plaintiffs' alleged losses. By the time the MCG arbitration award was announced, Leap's stock had already lost over 98% of its value. Accordingly, the Whittington Plaintiffs cannot plead and prove loss causation and the Circuit Court should have dismissed their claims.

2. Leap Disclosed the Risks That AWG and the Whittington Plaintiffs Claim Were Omitted

A claim for securities or common law fraud must be dismissed where the defendants have disclosed the precise risks the plaintiff claims were omitted. *See* Miss. Code Ann. § 75-71-717(a)(2) (a buyer who knows of the untruth or omission may not recover); *Owens Corning*, 868 So.2d at 343 (plaintiff who knows of untruth may not recover). This Court has previously rejected attempts by investors to predicate liability for securities fraud upon allegedly omitted facts that were actually disclosed. *See Allyn*, 725 So.2d at 103.

In *Allyn*, the defendants prepared and distributed a private placement memorandum (the "PPM") to raise capital to build a casino. *Id.* at 97. Certain investors suffered a loss when the casino encountered financial and construction problems. *Id.* The investors brought a claim under, *inter alia*, the MSA, asserting that the PPM failed to disclose the risks associated with investing in the casino business. *Id.* This Court reviewed the PPM in its entirety and dismissed the case, holding that "claims of concealment are not well-founded" where "[t]he Defendants' filings with the SEC openly reflect the problems with the [investment]." *Id.* at 100. The Court explained: "It is virtually impossible to read the PPM in its entirety without realizing the risky nature of the casino venture. Additionally, all of the complaints alleged by

the Investors are addressed by the PPM. The Investors are merely seeking a scapegoat for their poor investment." *Id.* at 104.

The same is true here. Plaintiffs' claims focus on the Leap Defendants' alleged failure to disclose the risks associated with the MCG transaction. As shown above (*see supra* at 25-29), Leap disclosed these risks. Plaintiffs' state law claims should have been dismissed for this reason alone.

3. Plaintiffs Fail to Allege That the Leap Defendants Acted With Scienter

The AWG Complaint and the FARC are also devoid of any allegation that the Leap Defendants acted with scienter. To state a cause of action under Section 717, plaintiff must plead that defendants engaged in, "[alt the very least, intentional or deceptive conduct." *Russell,* 754 So.2d at 1256 (citing *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976)). Similarly, to establish a claim for common law fraud, plaintiff must show that the defendants knew that a representation was false and intended the plaintiffs to rely on it. *Owens Corning,* 868 So.2d at 343. Here, Plaintiffs have not made any scienter allegations that are specific to any of the Leap Defendants. Instead, they have provided only general allegations that the Leap Defendants, as a group, acted with scienter. AWG Rec. at 81-84 (AWG Compl. ¶¶ 109-111); Whitt. Rec. at 188-191 (FARC ¶¶ 110-112). This boilerplate fails

to allege specific facts to support an inference that the Leap Defendants acted with the intent to deceive. *See, e.g., Lou v. Belzberg,* 728 F. Supp. 1010, 1022-23 (S.D.N.Y. 1990) (dismissing securities and common law fraud claims for failure to allege sufficient facts to support an inference of fraudulent intent; "when more than one defendant is charged with fraud, the complaint must particularize each defendant's alleged participation in the fraud").[17]

II. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND STAY PROCEEDINGS

In the Circuit Court, the Leap Defendants also moved under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "FAA") to compel arbitration of Plaintiffs' claims. Section 2 of the FAA provides, in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction

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[17] Since Plaintiffs fail to plead a predicate claim for primary liability under the MSA or common law, their claim for "control person" or "aiding and abetting" liability under Section 719 of the MSA must also fail. *See Tatum v. Smith,* 887 F. Supp. 918, 924 n.6 (N.D. Miss. 1995) (MSA "mirrors the federal securities act" and should be interpreted similarly), *aff'd sub nom. Tatum v. Legg Mason Wood Walker, Inc.,* 83 F.3d 121 (5th Cir. 1996); *see also R2 Invs.,* 401 F.3d at 641 (control person liability may not be imposed absent an underlying violation).

> involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . *shall* be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).

In enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Terminix,* 904 So.2d at 1054, quoting *Russell v. Performance Toyota, Inc.,* 826 So.2d 719, 722 (Miss. 2002). Congress thus "mandated [the] enforce[ment] [of] arbitration agreements contained in contracts involving commerce." *Terminix,* 904 So.2d at 1055; *accord IP Timberlands Operating Co. v. Denmiss Corp.,* 726 So.2d 96, 107 (Miss. 1998), quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984).

The FAA establishes "a strong presumption in favor of arbitration." *IP Timberlands,* 726 So.2d at 107. Under the FAA, "[d]oubts as to the availability of arbitration must be resolved in favor of arbitration." *Terminix,* 904 So.2d at 1054, quoting *Russell,* 826 So.2d at 722; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . "). As this Court

observed in *IP Timberlands,* "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue," the parties should be compelled to arbitrate their claims and "a stay pending arbitration should be granted." 726 So.2d at 107, quoting *Wick v. Atlantic Marine, Inc.,* 605 F.2d 166, 168 (5th Cir. 1979).

Notably, "[t]he case law in Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another." *Smith Barney, Inc. v. Henry,* 775 So.2d 722, 725 (Miss. 2001). Indeed, this Court "has long observed a policy favoring agreements to arbitrate" (*see IP Timberlands,* 726 So.2d at 107) and has stated that it "will respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution." *Terminix,* 904 So.2d at 1054, quoting *Russell,* 826 So.2d at 722; *accord MS Credit Center, Inc. v. Horton,* 926 So.2d 167, 174-75 (Miss. 2006); *McKenzie Check Advance,* 866 So.2d at 450.

Here, the Agreement between Leap and AWG contains a broad arbitration clause providing for arbitration of "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement." AWG Rec. at 1520-1521 (Section 12.11 of the Agreement). As demonstrated below, the FAA applies to the Agreement, the parties' "dispute" is within the scope of the arbitration clause, and the

Circuit Court should have ordered Plaintiffs to arbitrate their claims.

A. The FAA Applies to the Agreement

The FAA, "resting on Congress's authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts." *IP Timberlands,* 726 So.2d at 107, citing *Moses H. Cone,* 460 U.S. at 24. "'The sine qua non of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in interstate commerce.'" *Smith Barney,* 775 So.2d at 724, quoting *Peoples Sec. Life. Ins. Co. v. Monumental Life Ins. Co.,* 867 F.2d 809, 813 n.4 (4th Cir. 1989); *see also McKenzie Check Advance,* 886 So.2d at 450 ("Section 2 of the Federal Arbitration Act, which makes enforceable a written arbitration provision in 'a contract evidencing a transaction involving commerce,' 'should be read broadly to extend the Act's reach to the limits of Congress' Commerce Clause Power.'") (citation omitted). The Agreement in this case is such a contract.

This Court's decision in *Smith Barney* is directly on point. In that case, this Court held that the FAA applied to a customer agreement between a securities investor and a brokerage firm because "the securities industry, on a national level, meets the minimum threshold of affecting or bearing upon interstate

commerce." 775 So.2d at 725; *see also Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477 (1989) (contracts involving the securities industry involve commerce and are subject to the FAA).

Like the customer agreement in *Smith Barney,* the Agreement in this instance involves the securities industry and clearly "evidences a transaction in interstate commerce." As noted, Leap and AWG entered into the Agreement for the purpose of exchanging wireless licenses for Leap common stock. AWG Rec. at 9 (AWG Compl. ¶ 3). At the time, Leap stock was traded publicly on the Nasdaq National Market. *Id.* at 8 (AWG Compl. ¶ 2). Pursuant to Section 7.4(a) of the Agreement, Leap agreed to register the Leap shares it had provided to AWG so that AWG could sell those shares in the public securities market. *Id.* at 1507 (Section 7.4(a) of the Agreement). AWG ultimately sold those Leap shares in the public market. *Id.* at 9, 53, 78-79 (AWG Compl. ¶¶ 4, 56, 104). The Whittington Plaintiffs allegedly purchased the same Leap shares in the public market. Whitt. Rec. at 104, 185 (FARC ¶¶ 4, 105). Thus, the Agreement "directly involves a transaction [or transactions] in interstate commerce" and "is precisely the type of contract that Congress intended to be covered by the FAA." *Smith Barney,* 775 So.2d at 725-26.

B. Plaintiffs' Claims are Within the Scope of the Agreement's Arbitration Clause

Courts conduct a bifurcated inquiry on motions to compel arbitration under the FAA. First, they determine "whether the parties' dispute is within the scope of a valid arbitration agreement." *Terminix,* 904 So.2d at 1055; *accord Sullivan,* 882 So.2d at 132, quoting *East Ford, Inc. v. Taylor,* 826 So.2d 709, 713 (Miss. 2002). Second, they consider "'whether any federal statute or policy renders the claims nonarbitrable." *Washington Mut. Fin. Group, LLC v. Bailey,* 364 F.3d 260, 263 (5th Cir. 2004); *see also MS Credit Center, Inc.,* 926 So.2d at 175 ("[t]he second prong addresses whether legal constraints external to the agreement . . . foreclose arbitration of the claims").

Here, the parties' "dispute" is clearly within the scope of a valid arbitration agreement. As shown, the Agreement contains a broad arbitration clause. Section 12.11 of the Agreement provides, in pertinent part:

> [S]enior management employees of [Leap] and [AWG] shall meet and negotiate in good faith to reach a satisfactory resolution of any dispute arising in connection with this Agreement. If such negotiations do not result in a resolution within five (5) days after the first meeting of such representatives, then *any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement,* or its interpretation,

> enforceability or inapplicability may be submitted to binding arbitration at the election of either [Leap] or [AWG].

AWG Rec. at 1520-1521 (emphasis added); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (labeling nearly identical language a "broad arbitration clause").

According to Plaintiffs' own allegations, the *American Wireless* and *Whittington* actions "aris[e] under" and "relate[] to" the principal transaction underlying the Agreement: Leap's obligation under Sections 2.1 and 2.2 of the Agreement to issue approximately 1.9 million shares of Leap stock to AWG in exchange for AWG's wireless telephones licenses.[18] Likewise, Plaintiffs' claims "aris[e]" under" and "relate[] to" the adequacy of the risk disclosures that appeared in the June 2001 Registration Statement.[19] Leap's obligation to file the June 2001 Registration Statement arose under Section 7.4 of the Agreement. AWG Rec. at 9 (AWG Compl. ¶ 4), 1507 (Section 7.4(a) of the Agreement); Whitt. Rec. at 104 (FARC ¶ 4).

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[18] *See* AWG Rec. at 1495 (Sections 2.1 and 2.2 of the Agreement); *see also* AWG Rec at 9, 40-46, 49-53, 69-70, 78-79 (AWG Compl. ¶¶ 3-4, 31-39, 50-56, 76, 104); Whitt. Rec. at 104, 145-152, 155-159, 176-177, 185-186 (FARC ¶¶ 3-4, 31-39, 50-56, 77, 105).

[19] *See* AWG Rec. at 10-11, 51-52, 65-69, 75-81 (AWG Compl. ¶¶ 5-7, 54, 72-74, 95, 97-98, 104, 106); Whitt. Rec. at 105-106, 157-158, 172-176, 182-183, 185-187 (FARC ¶¶ 5-7, 54, 73-75, 96, 98-99, 105, 107).

Thus, the parties' "dispute" clearly "aris[es] under" and "relate[s] to" the Agreement and is within the scope of the arbitration clause. *See MS Credit Center,* 926 So.2d at 176 ("[b]ecause broad arbitration language is capable of expansive reach, courts have held that 'it is only necessary that the dispute 'touch' matters covered by the contract to be arbitrable'"), quoting *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.,* 139 F.3d 1061, 1067 (5th Cir. 1998).

In the Circuit Court, Plaintiffs acknowledged that their claims "aris[e] under" and "relate[ ] to" the Agreement. AWG Rec. at 2658-2659 (AWG's Opposition to the Leap Defendants' Motion to Compel Arbitration); Whitt. Rec. at 1623-1624 (Whittington Plaintiffs' Opposition to the Leap Defendants' Motion to Compel Arbitration). Plaintiffs nevertheless argued that their claims are not within the scope of the arbitration clause because they have asserted tort and statutory claims that "are not based on contract duties that arose from the Agreement but are based upon common law and statutory disclosure duties that arise independently and separately from the existence of the Agreement." Whitt. Rec. at 1632; *see also* AWG Rec. at 2663. This argument runs afoul of both the FAA and Plaintiffs' own allegations.

Under the FAA, parties are required to arbitrate their claims if they are within the scope of a valid arbitration clause. *See Russell,* 826 So.2d at 722 ("'[u]nless it can be said with positive assurance that

an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted'") (citation omitted). Accordingly, parties cannot avoid arbitration simply "by casting their claims in tort, rather than contract." *Grigson v. Creative Artists Agency, LLC,* 210 F.3d 524, 526 (5th Cir. 2000). This Court's decision in *Russell* is on point. In *Russell,* plaintiff entered into an agreement to sell a Toyota T-100 to an automobile dealership and purchase a Toyota Tacoma from the dealership. The agreement provided for arbitration of "[a]ny controversy or claim arising out of or relating to the vehicle which is the subject of this contract." 826 So.2d at 723. The dealership eventually repossessed the Tacoma and plaintiff filed an action for fraud, wrongful repossession and illegal conversion. Plaintiff argued that his claims were not subject to arbitration because they did not arise from the agreement and, instead, arose "from the actions and the willful and wanton disregard of [his] property rights by [the dealership]." *Id.* at 722. This Court held that plaintiff was required to arbitrate his claims. While the Court acknowledged that plaintiff had asserted tort claims based on his "property rights," the Court found that arbitration was required because "[a]ll of [plaintiff's] claims pertain to the disputed ownership of the Tacoma and the T-100, the two vehicles which are the subject of the Purchase Agreement." *Id.* at 721

Appendix A

As discussed above, Plaintiffs' allegations demonstrate that their claims "aris[e] under" or "relate[ ] to" the Agreement. Both the AWG Complaint and the FARC allege that (i) Leap issued approximately 1.9 million shares of Leap stock to AWG pursuant to its obligations under Sections 2.1 and 2.3 of the Agreement; (ii) Leap subsequently registered that stock by filing the June 2001 Registration Statement pursuant to its obligations under Section 7.4 of the Agreement; (iii) pursuant to the "plan" contemplated by the Agreement, AWG sold that Leap stock in the public market and the Whittington Plaintiffs subsequently purchased that stock in the public market; and (iv) Plaintiffs suffered damages as a result of this "integrated" series of transactions due to the allegedly inadequate risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligations under the Agreement.[20] Thus, regardless of whether Plaintiffs' claims are based on "duties that ar[o]se independently and separately from the existence of the Agreement" (AWG Rec. at 2663; Whitt. Rec. at 1632), their claims clearly "aris[e] under" and "relate[ ] to" the principal transactions underlying the Agreement and are therefore within the scope of the arbitration clause.

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[20] *See* AWG Rec. at 9-11, 40-46, 50-53, 65-70, 76-79 (AWG Compl. ¶¶ 3-7, 31-39, 51-56, 72-74, 76, 97-98, 104); Whitt. Rec. at 104-106, 145-152, 155-159, 172-177, 183, 185-186 (FARC ¶¶ 3-7, 31-39, 51-56, 73-75, 77, 98-99, 105).

Furthermore, there are no federal statutes or policies that would preclude enforcement of the arbitration clause in this instance. As an initial matter, Plaintiffs' claims are arbitrable; they are not subject to any statutory exceptions. *See Rodriguez,* 490 U.S. at 484-85 (claims under the 1933 Act may be arbitrated); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1272, 1280 (6th Cir. 1990) (claims under state securities act and for common law fraud subject to arbitration); *Terminix,* 904 So.2d at 1053-57 (Mississippi common law fraud claims are arbitrable). Nor are there any allegations in the AWG Complaint or the FARC that would suggest the Agreement is otherwise unenforceable under ordinary contract law principles. Thus, Section 12.11 of the Agreement applies to Plaintiffs' claims and should be enforced under the FAA.

C. Although the Leap Defendants Did Not Sign the Agreement, They May Enforce the Arbitration Clause

Courts applying the FAA have recognized that if a plaintiff "c[ould] avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] . . . the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold Corp.,* 920 F.2d at 1281. Thus, as "an outgrowth of the strong federal policy favoring arbitration" (*see Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986)), numerous courts

have held that a defendant may, in certain circumstances, enforce an arbitration clause in an agreement he did not sign. *See, e.g., International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416-17 (4th Cir. 2000) ("[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties").[21] The Leap Defendants may enforce the arbitration clause in the Agreement in this instance.

As an initial matter, it is well established that federal law controls the issue of whether a nonsignatory may enforce (or be bound by) an arbitration clause under the FAA. In the context of motions to compel arbitration, the United States Supreme Court has directed courts to "apply ordinary state-law principles that govern the formation of contracts" (*see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995)) and the "federal substantive law of arbitrability." *Moses H. Cone,* 460 U.S. at 24. Thus, state law determines questions "'concerning the validity, revocability, or enforceability of contracts generally,'" but the FAA "create[s] a body of federal substantive

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[21] *See also Grigson,* 210 F.3d at 527-528; *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 757 (11th Cir. 1997); *Mississippi Fleet Card, L.L.C. v. Bilstat, Inc.,* 175 F. Supp. 2d 894, 900-01 (S.D. Miss. 2001); *Hoffman v. Deloitte & Touche, LLP,* 143 F. Supp. 2d 995, 1004 (N.D. Ill. 2001).

law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *International Paper,* 206 F.3d at 417 n.4, quoting *Moses H. Cone,* 460 U.S. at 24. Because the determination of whether a non-signatory may enforce (or be bound by) an arbitration clause "'presents no state law question of contract formation or validity,' a court should 'look to the federal substantive law of arbitrability to resolve th[ese] question[s].'" *Bailey,* 364 F.3d at 267 n.6, quoting *International Paper,* 206 F.3d at 417 n.4; *see Terminix,* 904 So.2d at 1058 ("adopt[ing] the same principles announced by the court in *Bailey*").[22]

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[22] *See also Grigson,* 210 F.3d at 526-531 (applying federal law to determine whether non-signatory defendants could compel arbitration); *Letizia,* 802 F.2d at 1187 (permitting non-signatory defendants to enforce arbitration clause "[b]ecause the issue involves the arbitrability of a dispute, it is controlled by application of federal substantive law rather than state law"); *Hoffman,* 143 F. Supp. 2d at 1004 n.4 (non-signatory defendants could enforce arbitration clause "[b]ecause the determination of whether defendants can enforce the arbitration clauses presents no issue of contract formation or validity, the federal substantive law of arbitrability governs"); *Boucher v. Alliance Title Co.,* 127 Cal. App. 4th 262, 268 (2005) ("[t]he question presented, then, is whether defendant, a nonsignatory to the June 5, 2003, employment agreement, can rely on it to compel plaintiff to arbitrate his claims . . . [u]nder the [Federal] Arbitration Act, that question is answered not by state law, but by the federal substantive law of arbitrability"); *Metalclad Corp. v. Ventana Envtl. Org. P'ship,* 109 Cal. App. 4th 1705, 1712 (2003) ("[t]he question is not so much *what* is covered by the agreement but rather *who* may invoke it . . . [w]hether Ventana, a nonsignatory to that

(Continued on following page)

Appendix A

Federal law provides that non-signatory defendants may enforce arbitration clauses, under the doctrine of equitable estoppel in cases in which (i) plaintiff's claims "make[ ] reference to or presume[ ] the existence of" the written agreement containing the arbitration clause; or (ii) plaintiff alleges "substantially interdependent and concerted misconduct by both the nonsignatory [sic] and one or more of the signatories." *Mississippi Fleet Card,* 175 F. Supp. 2d at 900, quoting *Grigson,* 210 F.3d at 527; *see also Gulf Guar. Life Ins. Co. v Connecticut Gen. Life Ins. Co.,* 957 F. Supp. 839, 841 (S.D. Miss. 1997), citing *Sunkist Soft Drinks,* 10 F.3d at 758.

Here, Plaintiffs allege concerted misconduct between the non-signatory Leap Defendants and Leap, a signatory to the Agreement. The Southern District of Mississippi's decision in *Mississippi Fleet Card* is directly on point. In that case, a limited liability company (the "LLC") entered into an agreement with a corporation. *See* 175 F. Supp. 2d at 896. The agreement contained an arbitration clause. *See id.* The LLC and several of its members subsequently filed suit against the corporation and several of its officers and directors. *See id.* at 897-98. While the LLC and the corporation signed the agreement containing the arbitration clause, the defendant officers and directors did not. *See id.* at 900. The Court held

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agreement, may rely on it to compel Metalclad to arbitration is answered by federal law, not state law").

that the non-signatory defendants could compel arbitration. *See id.* Relying heavily upon plaintiffs' allegation that the non-signatory defendants "were 'employed by and/or were officers and/or directors of [the corporation] and were charged with the operations and decision making of the corporate defendants with respect to the conduct alleged [in the complaint],'" the Court found that plaintiffs' claims alleged concerted misconduct by the non-signatory defendants and the corporation that signed the agreement. *See id.* at 900-01.[23]

Both the *American Wireless* and *Whittington* actions are based upon the allegation that Leap and the Leap Defendants acted in concert to induce AWG to exchange AWG's wireless licenses for Leap stock. AWG Rec. at 9-10, 40, 69-71 (AWG Compl. ¶¶ 3-5, 31, 75-79); Whitt. Rec. at 104-105, 145-146, 176-178 (FARC ¶¶ 3-5, 31, 76-80). Plaintiffs allege that the Leap Defendants were officers and directors of Leap. AWG Rec. at 19-36 (AWG Compl. ¶¶ 16-28); Whitt. Rec. at 126-142 (FARC ¶¶ 17-29). Plaintiffs also allege that the Leap Defendants "had direct and supervisory involvement in the day-to-day operations

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[23] *See also Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 759, 765 (N.D. Ill. 2005) (permitting Deloitte & Touche to enforce an arbitration clause in an agreement it did not sign because the complaint alleged that, *inter alia*, Deloitte "directed and controlled" the defendant corporation that signed the agreement and "Deloitte and each of the defendants conspired with each other" to defraud plaintiffs).

of Leap and, therefore, [are] presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same." AWG Rec. at 74 (AWG Compl. ¶ 88); Whitt. Rec. at 180 (FARC ¶ 89). Plaintiffs refer to Leap as a "Co-Conspirator" and "Joint-Tortfeasor" and allege that the Leap Defendants acted "on behalf of," "in concert or conspiracy with," "aided and abetted," and "carried out a plan, scheme or course of conduct" with Leap. AWG Rec. at 19, 65-66, 69-71, 77-79 (AWG Compl. ¶¶ 15, 72, 76, 83, 102, 104); Whitt. Rec. at 125-126, 172-173, 176-177, 178, 184-186 (FARC ¶¶ 16, 73, 77, 84, 103, 105). Thus, Plaintiffs clearly have alleged "substantially interdependent and concerted misconduct by both the nonsignatory [*i.e.*, the Leap Defendants] and one or more of the signatories [*i.e.*, Leap]." *See Mississippi Fleet Card,* 175 F. Supp. 2d at 900.

Plaintiffs' claims also "make[ ] reference to" and "presume[ ] the existence of" the Agreement. *See Sunkist Soft Drinks,* 10 F.3d at 758 (applying equitable estoppel; "[a]lthough Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement"). Both the AWG Complaint and the FARC recount in detail how Leap, the Leap Defendants, AWG, and the Whittington Plaintiffs negotiated and structured the transaction that was ultimately reflected in the Agreement. AWG Rec. at 40-46, 49-51 (AWG Compl. ¶¶ 31-39, 50-53); Whitt. Rec. at 145-152,

155-156 (FARC ¶¶ 31-39, 50-53). Also, Plaintiffs' claims are focused on the alleged inadequacy of the risk disclosures in the June 2001 Registration Statement. AWG Rec. at 10-11, 51-52, 65-69, 75-81 (AWG Compl. ¶¶ 5-7, 54, 72-74, 95, 97-98, 104, 106); Whitt. Rec. at 105-106, 157-158, 172-176, 182-183, 185-187 (FARC ¶¶ 5-7, 54, 73-75, 96, 98-99, 105, 107). As noted, Leap filed the June 2001 Registration Statement pursuant to its obligations under the Agreement. AWG Rec. at 1507 (Section 7.4(a) of the Agreement); *see also id.* at 44 (AWG Compl. ¶ 38(h)); Whitt. Rec. at 149 (FARC ¶ 38(h)). Thus, Plaintiffs' claims "make[ ] reference to" and "presume[ ] the existence of" the Agreement and the Leap Defendants may enforce the arbitration clause under the doctrine of equitable estoppel. *See Holden,* 390 F. Supp. 2d at 766 (plaintiffs made reference to and presumed existence of agreement containing an arbitration clause where they "allege[d] that a central goal of the conspiracy and claimed fraud scheme was to induce individuals like [plaintiffs] to 'sell their companies' to EPS, as [plaintiffs] did through the [agreement]").

This result is consistent with this Court's decision in *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483 (Miss. 2005). In that ease, the Court found that "[a]bsent allegations of substantially interdependent and concerted misconduct between a non-signatory and a signatory who have a close legal relationship," a non-signatory cannot enforce an arbitration agreement. *Id* at 492. Unlike in *B.C.*

Rogers, Plaintiffs have alleged substantially interdependent and concerted misconduct between the non-signatory Leap Defendants and Leap, a signatory to the Agreement (*see supra* at 43-44); Plaintiffs also have alleged that the Leap Defendants had a close legal relationship with Leap – *i.e.*, that they were officers and directors of Leap during the relevant period. AWG Rec. at 19-36 (AWG Compl. ¶¶ 16-28); Whitt. Rec. at 126-142 (FARC ¶¶ 17-29). Thus, this Court's decision in *B.C. Rogers* does not apply here.

This result is also consistent with this Court's decision in *Parkerson v. Smith,* 817 So.2d 529 (Miss. 2002). In that case, the Court suggested, in dicta, that a defendant could not compel arbitration because it did not sign an agreement containing an arbitration clause. *See id.* at 535. In *Parkerson,* however, the Court did not address the issue of whether a non-signatory defendant may compel arbitration under equitable estoppel. Instead, the Court was focused exclusively on the third party beneficiary doctrine (*see id.* at 535), which is very different from equitable estoppel:

> Under third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 362 (5th Cir. 2003) (emphasis added) (citation omitted), *petition for cert. filed,* 75 USLW 3094 (Aug. 21, 2006) (No. 06-267). Unlike the defendant in *Parkerson,* the Leap Defendants are asking the Court to compel arbitration in light of "the parties' conduct after the contract was executed," *i.e.*, based upon the allegations Plaintiffs made in the AWG Complaint and the FARC. Thus, *Parkerson* does not apply here and the Leap Defendants should be permitted to enforce Section 12.11 of the Agreement.

D. Although the Whittington Plaintiffs Did Not Sign the Agreement, They Are Estopped from Avoiding Arbitration

Like Leap, AWG signed the Agreement. AWG Rec. at 1521 (signature page of the Agreement). Because the Leap Defendants have shown that they may enforce the Agreement's arbitration clause (*see supra* at 41-44), the only issue remaining is whether the Whittington Plaintiffs, who did not sign the Agreement, can be compelled to arbitrate their claims.

As this Court has recognized, "[i]t does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Terminix,* 904 So.2d at 1058 (citations omitted). Rather, it is well settled that a non-signatory plaintiff can be bound by an arbitration provision in a contract

he did not sign. *See Bailey,* 364 F.3d at 267 ("a non-signatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency"); *International Paper,* 206 F.3d at 416 ("a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause"); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.,* 9 F.3d 1060, 1064 (2d Cir. 1993).[24]

Under the theory of estoppel, a non-signatory is estopped from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause." *American Bureau of Shipping v. Tencara Shipyard S.P.A.,* 170 F.3d 349, 353 (2d Cir. 1999); *see also Deloitte Noraudit,* 9 F.3d at 1064; *Mississippi Fleet Card,* 175 F. Supp.2d at 902-03. As the Fifth Circuit explained in *Bailey,* "[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the

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[24] As demonstrated above, federal law controls the issue of whether a non-signatory plaintiff can be compelled to arbitrate his claims. *See supra* at 41-42 & n.22; *see also Bailey,* 364 F.3d at 267 n.6 ("because the determination of whether a non-signatory is bound by an arbitration provision 'presents no state law question of contract formation or validity,' a court should 'look to the federal substantive law of arbitrability to resolve this question'") (citation omitted); *Terminix,* 904 So.2d at 1058 ("adopt[ing] the same principles announced by the court in *Bailey*").

purposes underlying the enactment of the [FAA]." 364 F.3d at 267-68 (citation omitted).

The Second Circuit's decision in *Tencara* is instructive. In that case, a group of investors entered into a construction contract with a ship builder to build a racing yacht; the ship builder then entered into a contract with the defendant, a ship classification society, to inspect and certify the yacht. The contract between the ship builder and the defendant contained an arbitration clause; the contract between the ship builder and the investors did not. *See* 170 F.3d at 351. The yacht later suffered hull damage as a result of defective design. *See id* at 351. The ship builder, the investors, and the insurers of the yacht collectively sued the classification society, claiming that the defendant erroneously certified the yacht. *See id.* The defendant moved to compel arbitration against all plaintiffs, including the investors. The Second Circuit held that the defendant could compel the investors to arbitrate their claims. *See id.* at 353. The Court found that while the investors did not actually sign the contract between the defendant and the ship builder, they received several direct benefits from that contract, including lower insurance rates on the yacht and the ability to sail under the French flag. *See id.*; *see also Deloitte Noraudit,* 9 F.3d at 1064 (compelling non-signatory plaintiff Noraudit to arbitrate its claims; "Noraudit knowingly accepted the benefits of the Agreement through its continuing use of the name 'Deloitte' . . . [t]hus, Noraudit is estopped

from denying its obligation to arbitrate under the 1990 Agreement.").

Here, the FARC rests on the allegation that the transaction between Leap and AWG was intended to benefit the Whittington Plaintiffs individually by placing Leap stock in their hands. Whitt. Rec. at 104, 150-152, 185-186 (FARC ¶¶ 4, 39, 105). The Whittington Plaintiffs contend that this was "an integrated, pre-planned, fully-discussed arrangement worked out with Leap and the [Leap] Defendants before the [June 2001] Registration Statement was issued, and in fact before the original June 8, 2001 closing [of the Agreement]." *Id.* at 176-177 (FARC ¶ 77). The Whittington Plaintiffs also allege that they received a "benefit" from the Agreement by purchasing "the Leap Stock that had been owned by [AWG], had been registered by Leap, and had been sold into the public market [by AWG]." *Id.* at 104 (FARC ¶ 4); *see also id.* at 157-158, 182-183 (FARC ¶ 54, 96). Because the Whittington Plaintiffs contend they were entitled to receive certain benefits under the Agreement and, in fact, did receive certain benefits under the Agreement, they are estopped from refusing to comply with the arbitration clause.

In the Circuit Court, the Whittington Plaintiffs argued that they should not be compelled to arbitrate their claims because "***not a single party***" in the *Whittington* action is a signatory to the Agreement. Whitt. Rec. at 1629-1630 (Whittington Plaintiffs' Opposition to the Leap Defendants' Motion to Compel

Arbitration) (emphasis in original). This argument is unavailing. The only reason that AWG, one of the signatories to the Agreement, is not a party to the *Whittington* action is because the Whittington Plaintiffs have made an "obvious attempt to make an end-run around the arbitration clause." *Cf. Grigson,* 210 F.3d at 530. After the Whittington Plaintiffs filed the *Whittington* action, AWG, by the same counsel who filed the *Whittington* action, filed the *American Wireless* action in the same court. With the exception of replacing the Whittington Plaintiffs with AWG and adding one defendant, the AWG Complaint is identical in all material respects to the FARC. AWG has asserted *exactly* the same causes of action, predicated on *exactly* the same facts. *Compare* AWG Rec. at 7-11, 40-85 (AWG Compl. ¶¶ 1-7, 31-114) *with* Whitt. Rec. at 102-106, 145-192 (FARC ¶¶ 1-7, 31-115). There was simply no reason for AWG and its members (*i.e.*, the Whittington Plaintiffs) to file two separate but identical lawsuits against the Leap Defendants in the same court. Notwithstanding Plaintiffs' attempt to make an end-run around the arbitration clause, the Whittington Plaintiffs should be compelled to arbitrate their claims.

E. These Actions Should Be Stayed Pending Arbitration

The Leap Defendants also moved under Section 3 of the FAA for a stay of all proceedings in the *American*

Wireless and *Whittington* actions pending arbitration. Section 3 of the FAA provides, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3.

As shown above, both the *American Wireless* and *Whittington* actions are referable to arbitration pursuant to Section 12.11 of the Agreement. *See supra* at 36-41. Thus, pursuant to Section 3 of the FAA, the Circuit Court should have entered orders staying all proceedings in these actions until the parties arbitrate their dispute.

CONCLUSION

The Circuit Court's orders should be vacated. This Court should remand these actions to the Circuit Court with instructions to enter orders dismissing these actions in their entirety for failure to state a claim upon which relief can be granted. In the alternative, this Court should remand these actions with instructions to enter orders compelling Plaintiffs to arbitrate their claims and staying all proceedings in these actions pending arbitration.

RESPECTFULLY SUBMITTED this the 17th day of November, 2006.

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Appendix A

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served on all counsel of record herein via U. S. Mail, postage pre-paid, this the 17th day of November, 2006.

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Appendix B

APPENDIX B – RESPONSE BRIEF OF WHITTINGTON PLAINTIFFS (APPELLEES) FILED FEBRUARY 20, 2007

IN THE SUPREME COURT OF MISSISSIPPI
Cause No. 2005-IA-001827-SCT

QUALCOMM INCORPORATED **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01829-SCT

QUALCOMM INCORPORATED **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

(Caption Continued On Inside Cover)

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF THE WHITTINGTON PLAINTIFFS (APPELLEES) IN RESPONSE TO BRIEF OF APPELLANT LEAP DEFENDANTS
ORAL ARGUMENT REQUESTED

Appendix B

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Consolidated With:
Cause No. 2005-IA-01841-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01895-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

Appendix B

Consolidated With:
Cause No. 2005-IA-01894-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01883-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr. Revocable Trust; Dr. Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E. Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pitman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, Individually and as Trustee for the Homer A. Whittington, Jr., Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and

Shirley E. Smith as trustees for the Smith Family Trust, Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr.; William M. Yandell, III; William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; and Susan Yandell McKee, Walcott and Caldwell, LLC, Dr. Richard Rushing, Jane T. Mills, William P. Thomas, Darden North, Dr. Terrell Willimas, Wirt A. Yerger, Jr., James T, Thomas, IV, Claiborne Deming Dr. David Merideth, Mary Jane Finney, David Bailey, Kim McDonald, Debra Morton, Gordon Morton, Gordon Morton, IRA, Ann Carter Thomas, Betty J. Thomas Marital Trust, Bill Thomas, James T. Thomas, Martha Ross Thomas, W.P. Thomas, Jr., Elaine Chatham, Henry Chatham, Franklin and Marie Chatham, Wise Carter Child & Carraway Retirement Plan, James Eckert, Lori Moskowitz, and Bertie Heiner, the Plaintiffs in this action.

2. American Wireless License Group, LLC.

3. J. Michael Rediker, Peter J. Tepley, Page A. Poerschke and Meredith Jowers Lees of Haskell Slaughter Young & Rediker, LLC, 1400 Park Place Tower, 2001 Park Place North, Birmingham, Alabama 35203, attorney for Plaintiffs in this action.

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6. Qualcomm Incorporated, a Defendant in this action.

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9. Harvey P. White; Scot B. Jarvis; Susan G. Swenson; Thomas J. Bernard; Jeffrey P. Williams; Anthony R. Chase; Michael B. Targott; Jill E. Barad; Robert C. Dynes; James E. Hoffman; Stewart Douglas Hutcheson; Daniel O. Pegg; and Leonard C. Stephens (the "Leap Defendants"), Defendants in this action.

10. David W. Clark and Mary Clay Morgan, Bradley Arant Rose & White LLP, attorneys for the Leap Defendants.

11. Boris Feldman, Robert P. Feldman, Clayton Basser-Wall, and Mark T. Oates of Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California, 94304, attorneys for the Leap Defendants.

/s/ Peter Tepley
Peter J. Tepley

Appendix B

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument. Oral argument may be helpful to the Court if, after considering the briefs, the Court has questions concerning the facts and the law. Oral argument will aid the Court in its decision-making process.

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STATEMENT OF THE ISSUES

1. Was the Circuit Court correct in denying Appellant Leap Defendants' Motion to Compel arbitration when no plaintiff and no defendant in this case executed the arbitration agreement that the Leap Defendants are attempting to use to compel arbitration?

2. Under Mississippi law, to prevail on a pre-discovery motion to dismiss, the moving party must establish that (i) when all the facts pled in the Complaint are taken as true; ***and*** (ii) when the Complaint is construed liberally in favor of the non-moving party; (iii) it still "appears beyond doubt that the [non moving party] will be unable to prove any set of facts in support of [their] claim[s]." *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1275 (Miss. 2006). When the factual allegations of the Complaints are taken as true and the Complaint is construed liberally in favor of the Whittington Plaintiffs, did the Leap Defendants fail to meet its high burden of showing that "it appears beyond doubt [that] the [Whittington Plaintiffs] will not be able to prove any set of facts in support of [their] claim[s]" for common law fraud and

violations of: (1) Section 11 of the 1993 Securities Act; (2) Section 15 of the 1933 Securities Act, (3) the Mississippi Securities Act?

PRELIMINARY STATEMENT

This appeal concerns the Circuit Court of Hinds County's denials of both a motion to compel arbitration and a pre-discovery motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs, Homer A. Whittington, Jr., as Trustee for the Homer A. Whittington, Jr., Revocable Trust; Dr. Edwin Dodd; Douglas Packer; Robert G. Germany; Joseph E. Roberts, Jr.; C. Victor Welsh, III; Crymes M. Pitman; Lucy P. Culver; Jeffrey L. Smith; Crymes G. Pittman, Individually and as Trustee for the Homer A. Whittington, Jr., Deferred Compensation Trust; Yerger Properties, LP; Lyndel B. Smith and Shirley E. Smith as trustees for the Smith Family Trust; Betty Sue Yandell; Y. Clifton Yandell; William M. Yandell, Jr.; William M. Yandell, III; William M. Yandell, III IRA; Blue Mountain Wireless, LLC; W.M. Yandell FLP, LP; Susan Yandell McKee; Walcott and Caldwell, LLC; Dr. Richard Rushing; Jane T. Mills; William P. Thomas; Darden North; Dr. Terrell Williams; Wirt A. Yerger, Jr.; James T, Thomas, IV; Claiborne Deming; Dr. David Merideth; Mary Jane Finney; David Bailey; Kim McDonald; Debra Morton; Gordon Morton; Gordon Morton, IRA; Ann Carter Thomas; Betty J. Thomas Marital Trust; Bill Thomas; James T. Thomas; Martha Ross Thomas; W.P. Thomas, Jr.;

Elaine Chatham; Henry Chatham; Franklin and Marie Chatham; Wise Carter Child & Carraway Retirement Plan; James Eckert; Lori Moskowitz; and Bertie Heiner (collectively, the **"Whittington Plaintiffs"**) respectfully submit this brief in response to the appeal filed on behalf of Defendants, Harvey P. White; Scot B. Jarvis; Susan G. Swenson; Thomas J. Bernard; Jeffrey P. Williams; Anthony R. Chase; Michael B. Targott; Jill E. Barad; Robert C. Dynes; James E. Hoffman; Stewart Douglas Hutcheson; Daniel O. Pegg; and Leonard C. Stephens (collectively, the **"Leap Defendants"**). Said appeal challenges certain orders of the Circuit Court denying the Leap Defendants' motions to compel arbitration and stay proceedings or, in the alternative, to dismiss.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

This case has been stalled and delayed at every turn by the Leap Defendants' creative use of procedural motions. This matter has been pending almost ***five years***. However, to date ***no discovery*** has commenced.

This case was originally filed on December 21, 2002, in the Circuit Court for the First Judicial District of Hinds County, Mississippi. In May 2003, the Whittington Plaintiffs filed the First Amended and Restated Complaint. Due to a back log in the

Circuit Clerk's office, the Leap Defendants were not all served until April 29, 2003.

The Leap Defendants improperly removed this matter on May 29, 2003, to the United States District Court for the Southern District of Mississippi, Jackson Division. This case was stalled at the federal level for almost a year because three judges assigned to the case recused themselves. While at the federal level, the Leap Defendants filed several unfounded procedural motions and sought to have the case dismissed. Finally, on April 7, 2004, this case was reassigned to the Honorable David Bramlette who granted Plaintiffs' motion to remand and sent case back to the Circuit Court of Hinds County on September 28, 2004.

In another attempt to stall and delay this matter further, the Leap Defendants filed a Motion to Reconsider the order remanding this case to state court. On November 10, 2004, Judge Bramlette properly pointed out in his order denying the Motion to Reconsider that the Leap Defendants had not raised any new issues and the case should be remanded. The Leap Defendants also improperly asked the United States District Court to enter a stay to allow them the opportunity to appeal the remand order. However, Judge Bramlette properly denied that motion recognizing that an order to remand based on lack of subject matter is not reviewable on appeal.

Appendix B

Upon remand, this matter was assigned to Judge Tomie Green. The parties agreed to a scheduling order that established that the Leap Defendants must file a responsive pleading to the Complaint on or before January 14, 2005. Rather than answering the Complaint, the Leap Defendants' filed a Motion to Compel Arbitration and Stay Proceedings, or in the alternative, to Dismiss Plaintiffs' First Amended and Restated Complaint. The briefing on the Leap Defendants' Motion was completed on March 15, 2005. The hearing on the Leap Defendants' Motion was originally set for June 14, 2005. However, due to an unfortunate death in Judge Green's family, the hearing was rescheduled until August 15, 2005. Judge Green properly denied the Leap Defendants' Motion at the hearing and this Appeal followed.

B. STATEMENT OF THE FACTS

The action on appeal alleges actions, omissions, and misrepresentations made by the Leap Defendants that Plaintiffs allege constitute common law fraud, violate the Securities Act of Mississippi (the Mississippi Act), and violate Sections 11 and 15 of the Federal Securities Act of 1933 ("1933 Act").

The following facts are taken from the First Amended and Restated Complaint[1] and must be

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[1] References to "FARC at ¶ ___" are to the First Amended and Restated Complaint.

taken as true for purposes of the Leap Defendants' Motion to Dismiss. *Arnona v. Smith*, 749 So. 2d 63 (¶ 6) (Miss. 1999). American Wireless Group ("AWG"), a Mississippi limited liability company owned wireless spectrum licenses issued by the Federal Communications Commission ("FCC") for certain key markets in the southeastern United States. The Whittington Plaintiffs are members of AWG who possessed a significant ownership in that company. Whit. R. 103-104. (FARC at ¶ 4) Leap Wireless International, Inc. ("Leap"), which is not a party to this action, is a wireless service provider whose primary offering is a service marketed under the brand name "Cricket." Whit. R. 103 (FARC at ¶ 2). "Cricket" features unlimited wireless calling from a specified area for a fixed monthly fee. *Id.* Leap became, and was at all times relevant hereto, a publicly held company and its stock was listed on the NASDAQ/NMS under the symbol "LWIN." *Id.* The Leap Defendants are the officers and directors of Leap, who acted at all times relevant hereto as the "controlling persons" of Leap. Whit. R. 126-142 (FARC at ¶¶ 17-29).

On February 7, 2001, based on inducements and representations made by the Leap Defendants, AWG agreed to enter into a contract with Leap, entitled "Agreement for Purchase and Sale of Licenses" (the "Agreement"), to sell to Leap the FCC Licenses it owned for wireless spectrum in Jackson, Mississippi; Birmingham, Alabama; Tuscaloosa, Alabama; and

Jonesboro, Arkansas (the "Licenses"). Whit. R. 104 (FARC at ¶ 3). Under the Agreement, the Licenses were sold to Leap in exchange for 1,900,829 shares of Leap stock, 190,083 shares of which were to beheld in escrow for one year. Whit. R. 148 (FARC at ¶ 37). The Agreement provided that Leap would register the Leap stock within 30 days following the closing of the sale. The closing occurred on June 8, 2001, and the Leap shares held in escrow were released one year later on June 8, 2002. On June 15, 2001, as required by the Agreement, Leap caused a Form S-1 Registration Statement for the entire 1,900,829 shares of Leap stock to be filed with the SEC. Whit. R. 157-58 (FARC at ¶ 54).

Even before the June 8, 2001 closing, it was known by all parties to the Agreement that the Whittington Plaintiffs, who were members of AWG, would become Leap shareholders. Whit. R. 150-52 (FARC at ¶ 39). Because AWG had among its membership quite a number of unaccredited investors, Leap was unwilling to directly issue its stock to all AWG members. *Id.* Therefore, a "work-around-the-problem" scenario was devised by the parties, which contemplated the following connected steps: (1) Leap would issue the stock to AWG, as the accredited investor; (2) Leap would not allow AWG to dissolve and distribute the stock to its members; instead, Leap would register the stock for resale in AWG's name; and (3) the AWG members would then buy the Leap stock back in essentially simultaneous purchases with UBS (as a

broker-dealer) serving as the seller of the Leap stock in the buy-back. *Id.* This "buy back" proceeded slowly during the fall of 2001, reaching completion in December 2001. In practice, Leap was selling its stock to the Whittington Plaintiffs, but was required to cast the transaction in the series of connected steps set forth above. Whit. R. 151 (FARC at ¶ 39(c)).

The Whittington Plaintiffs were induced by the Leap Defendants to invest in Leap, participate in the purchase and buy-back, and retain their Leap stock. Whit. R. 105 (FARC at ¶5). Such inducement was made by, *inter alia*: (1) the material misstatements and omissions of material fact contained in the Registration Statement (which made possible the presence of such stock in the market); and (2) the disclosure failures of the Leap Defendants. *Id.* During the negotiations between Leap and AWG, and in filing the June 15, 2001 Registration Statement and August 14, 2001, SEC Form 10-Q Report, the Leap Defendants knowingly misrepresented Leap's financial health and failed to disclose the true risks associated with Leap's legal dispute with a company called MCG (MCG). Whit. R. 157-58 (FARC at ¶ 54). The undisclosed risks – which in fact came to fruition – included Leap's breach of its financing covenants, the dilution in value of Leap stock, and Leap's eventual bankruptcy. Whit. R. 170-71 (FARC at ¶ 69). The Leap Defendants' actions, omissions, and misrepresentations directly resulted in the utter obliteration in value of Leap stock held by the Whittington Plaintiffs, each of

whom suffered damages individually based on the number of shares they purchased. Whit. R. 171 (FARC at ¶ 70).

SUMMARY OF THE ARGUMENT

The Leap Defendants' Motion (and this Appeal) was merely another attempt by the Leap Defendants' to delay and postpone discovery and the inevitable trial on the merits in this matter. The Leap Defendants cannot establish that: (1) a valid arbitration agreement governs the Whittington Plaintiffs' claims, or alternatively, (2) they have met their heavy burden that the Whittington Plaintiffs claims should be dismissed before discovery has even commenced

The Circuit Court properly denied the Leap Defendants' Motion to Compel Arbitration because the Leap Defendants cannot demonstrate that a valid arbitration agreement exists between the Leap Defendants and the Whittington Plaintiffs where, as here, no party is a signatory to an arbitration agreement. It is well settled that "[a]rbitration is a matter of contract between the relevant parties [and] ***no*** party can be required to arbitrate absent an agreement to do so." *McKenzie Check Advance of Miss., LLC v. Hardy,* 866 So. 2d 446, 450 (Miss. 2004) (emphasis added). Here, neither the Leap Defendants nor the Whittington Plaintiffs executed an applicable arbitration agreement or agreed to arbitrate the claims at issue. Therefore, this matter cannot be

compelled to arbitration and the Circuit Court's ruling should be affirmed. The Circuit Court correctly denied the Leap Defendants' Motion, and the Whittington Plaintiffs have a right to have their claims heard by a jury after discovery has been conducted.

The Circuit Court also properly denied Leap Defendants' Motion to Dismiss because the Leap Defendants at this preliminary stage of litigation simply cannot meet the heavy burden that they must meet in order to prevail on their Motion to Dismiss. To prevail on their Motion, the Leap Defendants must establish that (i) when all the facts pled in the Complaint are taken as true *and* (ii) when the Complaint is construed liberally in favor of the Whittington Plaintiffs; (iii) it still "appears beyond doubt [that] the [Whittington Plaintiffs] will not be able to prove any set of facts in support of [their] claim[s]." *Black v. City of Tupelo,* 853 So. 2d 1221, 1224 (Miss. 2003); *see also Poindexter v. Southern United Fire Ins. Co.,* 838 So. 2d 964, 966 (Miss. 2003) (quoting *Sennett v. United States Fid. & Guar. Co.,* 757 So. 2d 206, 209 (Miss. 2000).

The Whittington Plaintiffs have clearly stated claims for common law fraud as well as for the Leap Defendants' violations of the Securities Act of Mississippi, and sections 11 and 15 of the federal Securities Act of 1933 (the "1933 Act"). For example, when the factual allegations of the Complaints are taken as true, as they must be at this juncture, they establish that the Leap Defendants acted in concert with the

Co-Conspirators[2] to induce the Whittington Plaintiffs to purchase and to retain their shares of Leap common stock ("Leap Stock") to the Whittington Plaintiffs' detriment. In addition, under the unique facts present here, including the "work around the problem," the Whittington Plaintiffs have properly pled a violation of Section 11 as the Complaint clearly demonstrates that the Whittington Plaintiffs purchased the Leap Stock at issue pursuant to a Registration Statement that contained numerous material misrepresentations and omissions. Further, the Whittington Plaintiffs have standing to assert these claims because the Registration Statement at issue was filed for the sole purpose of selling the Leap Stock to AWG and in turn to the Whittington Plaintiffs. As the Whittington Plaintiffs have asserted viable Section 11 claims, the Leap Defendants liability under Section 15 is clear because the Leap Defendants were Leap's officers and directors.

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[2] The Whittington Plaintiffs alleged that UBS PaineWebber, Inc., Roger Davis, James O'Brien, Collette Fleming, and QUALCOMM acted in concert with the Leap Defendants to perpetrate the Fraud against the Plaintiffs. UBS, Davis, O'Brien and Fleming were not parties to this action. Plaintiffs' Claims against the UBS Defendants were the subject of an arbitration before the National Association of Securities Dealers and have since been settled.

Appendix B

STANDARD OF REVIEW

The standard of review by a Mississippi appellate court of a circuit court's denial of a motion to compel arbitration or a motion to dismiss is *de novo,* such that this Court must perform the same review as did the circuit court below. *Arceo v. Tolliver,* 2006 WL 3317036 *2 (Miss. 2006); *Holman Dealerships, Inc. v. Davis,* 934 So. 2d 356, 358 (Miss. Ct. App. 2006); *Pruitt v. Hancock Medical Center*, 942 So. 2d 797, 800 (Miss. 2006). However, if the actions of a trial court can be upheld for any reason, the appellate court should affirm. *Gates v. Gates,* 616 So. 2d 888, 890 (Miss. 1993); *Vinson v. Roth-Roffy*, 829 So. 2d 1250, 1252 (Miss. Ct. App. 2002). Further, this Court must affirm where there is ***any*** ground disclosed by the record upon which the decision could have properly been reached, notwithstanding the lower court did not make explicit its grounds. *DeFoe v. Great Southern Nat. Bank N.A.,* 547 So. 2d 786, 789 (Miss. 1989) (citations omitted).

When reviewing a trial courts ruling on a motion to dismiss, this Court must consider the allegations of the complaint to be true, and the motion to dismiss "should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Park on Lakeland Drive, Inc. v. Spence,* 941 So. 2d 203, 206 (Miss. 2006). (citations omitted).

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ARGUMENT

Although the Leap Defendants addressed the denial of their motion to dismiss first in the opening brief, the Court must first decide whether this dispute is properly before the Court or whether it should be arbitrated. Critical to this inquiry is the fact that ***neither the Whittington Plaintiffs nor the Leap Defendants are signatories to any arbitration agreement that compels arbitration of this matter***. Despite the fact that the Leap Defendants cannot cite to a single case in which this Court or any other has compelled two non-signatories to arbitration, the Leap Defendants contend that this matter should be compelled to arbitration. If this Court agrees that the Whittington Plaintiffs' claims should be arbitrated, then it cannot rule on the Leap Defendants' motion to dismiss, as it would be without jurisdiction to do so since these claims would have to be arbitrated.

AWG has recently agreed to arbitrate its claims and has fried a statement of claim with the AAA. Therefore, the issue to be resolved by the Court is whether the Leap Defendants, who are *non-signatories,* can enforce the arbitration clause in the Agreement against other *non-signatories* – the Whittington Plaintiffs. The Whittington Plaintiffs did not sign the Agreement, which contains the arbitration clause (Whit. R. 684), and neither did the Leap Defendants. *Id.* The Leap Defendants are asking the Court to vastly expand current arbitration law and

pen groundbreaking arbitration law precedent. ***Again, neither the Whittington Plaintiffs nor the Leap Defendants are signatories to any arbitration agreement that compels arbitration of this matter.*** As discussed below, the Agreement binds only the two corporations and in no way binds its officers and directors. *See FDIC v. Trans Pacific Industries, Inc.*, 14 F.3d 10, 12 (5th Cir. 1994) (individual who signs promissory note manifests that he is signing in representative capacity where agent names his principal and places "by:" before his signature or follows it with a display of agency status, "preferably his title in the represented institution.").

I. THE CIRCUIT COURT PROPERLY DENIED THE LEAP DEFENDANTS' MOTION TO COMPEL ARBITRATION

The Agreement containing the arbitration clause at issue (which explicitly prohibits enforcement by non-parties),was "by and between . . . [AWG], a Mississippi limited liability company ("Seller"), and Leap . . . a Delaware corporation ("Buyer"). Whit. R. 656. The Agreement defines the Seller as AWG and it is signed "by" Wirt A Yerger, III as "its Manager and CEO." Whit. R. 656; 684. Similarly, the Agreement sets forth the Buyer as Leap and it is signed "by" Harvey P. White ("White"), as "Its: Chairman and CEO." *Id.* The Agreement between AWG and Leap explicitly limits enforcement by non-parties by stating:

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> This agreement shall be binding upon and inure to the benefit of the parties hereto and their successor and Permitted Assigns. The successors and permitted assigns hereunder shall include without limitation, in the case of Buyer, any permitted Assignee as well as the successors in interest to such Permitted Assignee. ***Nothing in this agreement, expressed or implied, is intended or shall be construed to confer upon any Person other than the parties and successors., and Permitted Assignees, any right remedy or claim under or by reason of this Agreement.***

Whit. R. 682.

The Agreement defines "permitted assignees" as, "Affiliates, subsidiaries, successors and assigns." *Id.* Furthermore, the provision at issue, Section 12.11, states, " . . . any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement, or its interpretation, enforceability or inapplicability **may** be submitted to bonding arbitration at the election of either ***Buyer or Seller.***" Whit. R. 683-84 (emphasis added). The term "Buyer" is defined in the Agreement as Leap. Similarly, the term "Seller" is defined as AWG. Whit. R. 656. In addition, the language of the arbitration provision says that disputes ***"may"*** be submitted to binding arbitration. Whit. R. 683-84. The word "may" customarily connotes discretion. *Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 346 (2005). In *Local 189,*

Service Emp. Union v. Scot Lad Foods, Inc., 513 F. Supp. 839 (D.C. Ill. 1981), the union brought an action to compel an employer to arbitrate a labor dispute. The court was called upon to consider a provision of a collective bargaining agreement that stated that the union "may request" arbitration. *Id.* at 841. The *Local 189* court held that the inference could clearly be drawn that the use of the word "may" gave the employer the option of rejecting a request for arbitration. Here the inference can be clearly drawn that AWG and anyone alleged to be bound by AWG, – i.e., the Whittington Plaintiffs – can choose to reject arbitration and instead bring its action in state court.

The Circuit Court correctly denied the Leap Defendants' motion to compel arbitration because the Whittington Plaintiffs cannot be compelled to arbitrate their current disputes with the Leap Defendants.

A. Neither the Whittington Plaintiffs nor the Leap Defendants Were Signatories to the American Wireless/Leap Wireless Agreement.

"[T]he first question to be addressed in adjudicating a motion to compel arbitration under the FAA is 'whether the parties agreed to arbitrate the dispute in question.'" *American Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537 (5th Cir. 2003) (quoting *Webb v. Investacorp.*, 89 F.3d 252, 258 (5th Cir. 1996)). The answer here is "no". Neither the Whittington Plaintiffs

nor the Leap Defendants are signatories to any arbitration agreement that compels arbitration of this matter. The Agreement was by and between AWG (Seller), and Leap (Buyer). Whit. R. 656. The Agreement defines the Seller as AWG and it is signed "by" Wirt A Yerger, III as "its Manager and CEO." Similarly, the Agreement sets forth the Buyer as Leap and it is signed "by" Harvey P. White ("White"), as "Its: Chairman and CEO." Whit. R. 656; 684. The Agreement binds only the two corporations and in no way binds its officers, directors or members. *See FDIC v. Trans Pacific Industries, Inc.*, 14 F.3d 10, 12 (5th Cir. 1994) (individual who signs promissory note manifests that he is signing in representative capacity where agent names his principal and places "by:" before his signature or follows it with a display of agency status, "preferably his title in the represented institution.").

Like the Whittington Plaintiffs, the Leap Defendants were also not signatories to the Agreement with the arbitration clause. The Leap Defendants incorrectly argue that "most of the Leap Defendants did not sign the agreement," because the fact is that ***none*** of the Leap Defendants signed the Agreement. White signed the agreement in his official capacity, not in his individual capacity. The Agreement was signed "by" White as "Chairman and CEO" of Leap. Whit. R. 684. A corporation can act only through its agents and there is no indication that either Yerger or White was signing the Agreement in their individual

capacities. Accordingly, Defendant White was not a signatory to the Agreement in his individual capacity. *See, Shemper v. Hancock Bank*, 40 So. 2d 742, 744 (Miss. 1949) (a person who signs an instrument using words indicating that he signed for and on behalf of a principal is not liable on the instrument if he was duly authorized to sign). Therefore, ***all*** of the named Defendants are non-signatories to the Agreement.

In sum, this Court has a situation where no Plaintiff and no Defendant signed an arbitration contract governing the dispute here. There is no case when arbitration has been compelled where, as here, not a single party in the lawsuit (plaintiffs or defendants) was a signatory to the arbitration agreement.

B. The claims of AWG and the Whittington Plaintiffs are based on the Leap Defendants' individual conduct and do not arise from the Agreement.

The estoppel or "intertwining theory" is inapplicable in this case because, the claims against the Leap Defendants, non-signatories to the Agreement, are not "intertwined with the agreement that the estopped party has signed." *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003). The current facts are similar to the facts of *Primerica Financial Services, Inc., v. Coley*, 192 F. Supp. 2d 655 (N.D. Miss. 2002). Coley, a signatory, brought an action against PFS and PLIC, both

non-signatories, based on their individual misconduct. PFS and PLIC sought to compel arbitration based upon a contract between Coley and their affiliate company, PFSI. The *Coley* Court held the investor's claims against PFS and PLIC did not fall within the arbitration clause even though the two companies were affiliated with PFSI. The *Coley* Court concluded: (1) "the signatory Coley has not raised allegations of 'substantially interdependent and concerted' misconduct by both the non-signatory Plaintiff PFS and PLIC, and the signatory PFSI; **indeed PFSI is not a party to Coley's . . . lawsuit**"; and (2) "there [was] no evidence before the court indicating that Coley must rely on the terms of her agreement with PFSI asserting her claims against the Plaintiff." *Id.* at 657-658. (emphasis added) The *Coley* Court concentrated on the fact that the complaint focused on PFS and PLIC's conduct and not PFSI's conduct. The *Coley* Court noted that PFSI was not a named party, which further evidenced that the claims were not intertwined. *See also, Bridas,* 345 F.3d at 361 (refusing to compel arbitration where the party sought to be esttopped **did not sign a contract containing an arbitration provision** and **never sued on the agreement**.)

As in *Coley* and *Bridas,* the Whittington Plaintiffs' complaint is based solely on the Leap Defendants' individual misconduct and does not invoke the terms of the Agreement. The Whittington Plaintiffs did not name Leap as a defendant. The tort claims

against the Leap Defendants are not based on contractual duties that arose from the Agreement but are based upon common law fraud and statutory duties that arise independently and separately from the existence of the Agreement.

For instance, the counts in the Complaint relating to securities fraud are derived from Mississippi's Security Act and the federal securities laws, which imposes a duty on all sellers of securities. The duty not to deceive or misrepresent the value of stock arises under these statutes and are not duties arising merely from the Agreement. In other words, the Leap Defendants owed a duty to the Whittington Plaintiffs based upon the federal securities laws and Mississippi's statutory law and that duty is independent of any Agreement. *Cf., Daimler Chrysler Corp. v. N.L.R.B.,* 288 F.3d 434 (D.C. Cir. 2002) (employment suit did not defer to arbitration because duty of employer to provide information to collective bargaining representative was independent of contractual duty under collective bargaining agreement); *Norman v. Occupational Safety Ass'n of Ala. Workmen's Comp. Fund,* 776 So. 2d 788 (Ala. 2000) (plaintiffs claims against a defendant were not based on the contract containing the arbitration clause, but were derived from company bylaws and other agreements not containing arbitration provisions). Thus, the Leap Defendants' reliance on *Mississippi Fleet Card, LLC v. Bilstat, Inc.,* 175 F. Supp. 2d 894 (S.D. Miss. 2001) is misplaced. The *Bilstat* facts are distinguishable

because, unlike here, the defendant did not owe a duty at common law or under statute to the plaintiffs absent the contractual relationship.

Likewise the fraud claims under Mississippi common law do not rely upon the Agreement as the basis of Leap Defendants' duties. Instead, they rely on the Leap Defendants' common law duty not to misrepresent a material fact, and it is that duty which forms the basis of the Complaint. The Leap Defendants unpersuasively argue that the allegations of the complaint allege substantially interdependent and concerted misconduct. The Complaint is thorough and designed to give the Court sufficient background information regarding the background of this action. However, it is clear from the Complaint that the claims are derived from statutory and common law and not the Agreement.

The Leap Defendants also make the argument that the only reason that AWG is not a party to the Whittington action is because the Whittington Plaintiffs have made an attempt to make an "end-run around the arbitration clause". Leap Defendants Brief at 48. To the contrary, the AWG action and the Whittington action involve two distinct types of complex stock sales transactions. The first type involved AWG selling valuable licenses issued by the FCC for certain key market areas in the southeastern United States to Leap for Leap Stock in deal dated February 7, 2001 which closed on June 8, 2001. The

second type involved the later sales of Leap Stock to the Whittington Plaintiffs beginning in October 2001.

AWG commenced its action because if it had known of the risks and consequences of the Leap-MCG deal it would not have agreed to accept Leap common stock in consideration for the sale of its FCC licenses. Leap common stock was trading at $38.50 on the date of execution of the Agreement and $30.42 a share on the date of the closing. On June 15, 2001, Leap filed a registration statement on Form S-3 registering all 1,900,829 shares of Leap common stock issued to AWG. 190,083 of these shares were held in escrow for one year until June 2002.

Between August and December of 2001, AWG sold the Leap common stock that was not held in escrow for an average price of $17.31 per share resulting in a substantial loss to AWG, which ***itself*** lost $29,613,0313.00 if valued from the execution date and $22,427,880.00 if valued from the date of the closing. During the year the 190,083 shares were held in escrow, Leap's common stock continued to decline in market value and upon the date that such shares were released from escrow, AWG was only able to sell them for an average price of $1.01 per share which resulted in an additional loss to AWG of $7,126,211.60 if valued from the date of execution and $5,590,218.80 if valued from the closing date.

In contrast, the causes of actions and damages alleged by the Whittington Plaintiffs are derived from

their role as equity holders of AWG who, pursuant to the "work-around-the problem", purchased and retained the Leap stock, which had been issued to AWG under the Agreement, based on alleged material misrepresentations and omissions by the Leap Defendants and others. The Leap stock held by the Whittington Plaintiffs was either sold for a loss or is still held by the individual Plaintiffs and is worthless today. Each of the Whittington Plaintiffs suffered damages individually based on the number of shares they purchased.

C. The Agreement limits enforcement by non-parties.

As discussed above, the Agreement between AWG and Leap explicitly limits enforcement by non-parties. Only the Buyer (Leap) or Seller (AWG) can elect arbitration. Whit. R. 683-84. In addition, the Agreement between AWG and Leap provides:

> This agreement shall be binding upon and inure to the benefit of the parties hereto and their successor and Permitted Assigns. The successors and permitted assigns hereunder shall include without limitation, in the case of Buyer, any permitted Assignee as well as the successors in interest to such Permitted Assignee. Nothing in this agreement, expressed or implied, is ***intended or shall be construed to confer upon any Person other than the parties and successors, and Permitted Assignees, any right remedy or***

claim under or by reason of this Agreement.

Whit. R. 682.

The Leap Defendants are not "permitted assignees" as that term is defined as, "Affiliates, subsidiaries, successors and assigns." *Id.* Also the Leap Defendants are not the successors of Leap. Thus, this provision adequately limits the rights, remedies and claims of any third person to enforce a provision of the contract.

A case recently decided by this Court, *Adams v. Greenpoint Credit, LLC,* 943 So. 2d 703 (Miss. 2006), is on point. In *Greenpoint Credit,* one of the plaintiffs and his wife had purchased a mobile home and signed an arbitration agreement related to the purchase of the mobile home. Subsequent to purchasing the mobile home, the plaintiffs wife passed away. The defendant drafted a payment for the mobile home from a joint checking account owned by the plaintiff and his daughter. The draft presented to the bank was signed by the plaintiffs deceased wife. The plaintiffs filed suit against the mobile home seller alleging fraud, negligence, intentional and/or negligent infliction of mental and emotional distress, breach of contract and defamation. The mobile home seller sought to compel arbitration of the claims brought by both the mobile home purchaser and his daughter. The trial court granted the motion to compel arbitration as to the daughter and the purchaser of the

mobile home. However, the Mississippi Court of Appeals reversed the trial court's decision as to the daughter holding that she did not agree to arbitrate any claims with the mobile home purchaser. The Court of Appeals also stayed the daughter's claims pending the father's arbitration. This Court affirmed the Court of Appeals decision that the arbitration agreement did not encompass claims asserted by the daughter and reversed the stay imposed by the Court of Appeals. This Court held that the equitable estoppel doctrine did not apply given the specific language of the arbitration clause at issue which stated:

> Any controversy or claim between or among ***you*** or ***me*** or our assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, ***if requested by either you or me,*** be determined by arbitration, reference, or trial by judge as provided below.

Id. at 704 (emphasis added); *see also Jim Burke Automotive, Inc. v. McGrue,* 826 So. 2d 122, 131-132 (Ala. 2002) (nonsignatories could not enforce arbitration agreement that expressly limited its enforcement to the defined "buyer" and "seller"). This Court held that the daughter was not a signatory to the contract: "[c]learly, [the purchasers of the mobile home] constitute the "you;" and the "me" is [the mobile home seller]." *Id.* at 708. Further, this Court held that the daughter was not a third-party beneficiary of the

contract. This Court also recognized that the doctrine of estoppel "is an extraordinary remedy to be used with caution." *Id.* at 709. Here, the doctrine of estoppel should not apply because the arbitration provision in the Agreement also specifically limits its enforcement to the "Buyer" and "Seller".

The Agreement does not intend to give any rights to third parties, including the right to compel arbitration. Whit. R. 682-84. Accordingly, the Leap Defendants, who are not parties to the Agreement, may not seek to enforce the arbitration provision of the Agreement.

D. Estoppel or "Intertwining" Theory Does Not Apply Under The Current Facts

The estoppel or "intertwining" theory does not apply to the facts of this case. Under that theory, "**a non-signatory** may enforce an arbitration agreement **against a signatory** of such agreement in cases in which: "(a) the non-signatory is alleged to be the agent of a signatory or (b) the claims against the non-signatory are fundamentally grounded in, intimately founded in and intertwined with, or arise out of and relate directly to the agreement containing the arbitration clause." *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 900 (S.D. Miss. 2001) (quoting *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 2d 839, 841 (S.D. Miss. 1997)) (citing *Sunkist Soft Drinks, Inc. v. Sunkist*

Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993)) (emphasis added). The estoppel theory "applies only to prevent 'a ***signatory*** from avoiding arbitration with a nonsignatory when the issues the ***nonsignatory*** **is seeking to resolve in arbitration are intertwined with the agreement that the *estopped party has signed.*'"** *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (quoting *Thomson-GSF., S.A. v. American Arbitration Assn*, 64 F.3d 773, 779 (2d Cir. 1995)). (emphasis in original). In *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000), the Court explained:

> [E]quitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First, equitable estoppel applies **when the *signatory* to a written agreement containing an arbitration clause** must rely on the terms of the written agreement in asserting its claims against the nonsignatory . . . Second, application of equitable estoppel is warranted when **the *signatory* to the contract containing an arbitration clause** raises allegations of substantially inter-dependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

210 F.3d at 527. (emphasis added). No court has applied the estoppel theory in situations where a ***non-signatory*** seeks to enforce an agreement

against ***another non-signatory***. The rule requires a signatory party. Here, however, there is not one.

In addition, a recognized exception to the estoppel or "intertwining" theory is applicable here and bars the relief sought by the Leap Defendants. Courts have held that language in arbitration provision, such as the one here, that explicitly limits enforcement to a "buyer" and a "seller" prohibits the application of an estoppel theory. *See Jim Burke Automotive, Inc. v. McGrue,* 826 So. 2d 122, 131-132 (Ala. 2002). Because the arbitration provision at issue clearly limits its enforceability by non-parties, the Leap Defendants cannot compel arbitration here.

1. The cases cited by Defendants are inapplicable.

As stated below, in each of the cases cited by the Leap Defendants, either the plaintiff or the defendant was a signatory to a contract containing an arbitration agreement. These are not the facts of the current case.

In *Mississippi Fleet Card,* unlike here, Mississippi Fleet Card, LLC, was a ***signatory*** to a development agreement, **and** its members, who were non-signatories to the agreement, brought an action against Bilstat Inc., also a ***signatory*** to the agreement, **and** its officers and directors, who were non-signatories. In *American Bureau of Shipping v. Tencara Shipyard S.P.A.,* 170 F.3d 349 (2d Cir. 1999),

unlike here, involved a **nonsignatory** that brought suit against a ***signatory*** based in part upon an agreement. Further, *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), concerned a ***signatory plaintiff*** filing an action against a non-signatory defendant.

Mississippi Fleet Card, Tencara Shipyard, or *Sunkist Growers* all the involved a **non-signatory** seeking to compel a **signatory** to arbitration, and are simply inapplicable here where neither the Whittington Plaintiffs nor the Leap Defendants are signatories to the Agreement.

2. Plaintiffs' claims are based on Defendants' individual conduct and do not arise from the Agreement.

As in *Coley,* 192 F. Supp. at 657-58, and *Bridas,* 345 F.3d at 361, see also discussion supra at pp. 12-13, the Whittington Plaintiffs' complaint is based solely on the Leap Defendants' individual misconduct and *is not based on breach of the terms of the Leap Agreement.* Additionally, the Plaintiffs do not name Leap as a defendant. The tort claims against the Defendants are not based on contract duties that arose from the Agreement but are based upon common law and statutory disclosure duties that arise independently and separately from the existence of the Agreement. Count I and Count II are derived from the MSA, which imposes a duty on all sellers of securities. The duty not to deceive or misrepresent

the value of stock arises from Mississippi's statutes and the federal Securities Act of 1933 §11, and are not contractual duties arising from the Agreement. In other words, the Defendants owe a duty to Plaintiffs based upon Mississippi's common and statutory law and federal securities registration statutory law and that duty is independent of any Agreement. *Cf., Daimler Chrysler,* 288 F.3d 434 (employment suit not compelled to arbitration because duty of employer at issue was independent of contractual duty); *Norman,* 776 So. 2d 788 (plaintiffs claims against a defendant were not based on the contract containing the arbitration clause, but rather on company bylaws and other agreements without arbitration provisions). Like Counts I and II, Count III arises from the Securities Act of 1933, which is independent and separate from duties imposed under the Agreement, and Count IV arises from the Leap Defendants' common law duty not to misrepresent a material fact. Although, the Complaints provide detailed background information, it is clear that the Whittington Plaintiffs' actions are based in statutory and common law and not the terms of the Agreement.

II. THE CIRCUIT COURT PROPERLY DENIED THE LEAP DEFENDANTS' MOTION TO DISMISS

The Whittington Plaintiffs have stated a valid claim for violation of Section 11 of the 1933 Act. Section 11 provides buyers of securities a private

remedy for false or materially misleading statements or omissions against any signer of the registration statement, any director or partner of the issuer, any professional who prepared or certified the registration statement, and any underwriter. 15 U.S.C. § 77(k). Because a plaintiff who purchased a security issued pursuant to a Registration Statement need only show a material misstatement or omission to establish a prima facie case against an issuer, the Whittington Plaintiffs have properly pled Section 11 violations. Whit. R. 182-83 (FARC at ¶¶ 94-101). As the United States Supreme Court stated in *Herman & MacLean v. Huddleston,* 459 U.S. 375, 381-382 (1983):

> If a plaintiff purchased a security issued pursuant to a registration statement, ***he need only show a material misstatement or omission to establish his prima facie case. Liability against the issuer of a security is virtually absolute, even for innocent misstatements. Other Defendants bear the burden of demonstrating due diligence.*** *See* 15 U.S.C. § 77k(b).")

(Emphasis added). Additionally, the 1933 Act "***impos[es] a stringent standard of liability on the parties who play a direct role in a registered offering***." *Id.* As discussed below, the Whittington Plaintiffs have met their pleading burden here.

Appendix B

A. The Circuit Court Properly Denied Defendants' Motion to Dismiss Section 11 Claims

The Whittington Plaintiffs' Complaint clearly delineates that the Whittington Plaintiffs' purchases were: (1) made pursuant to a registered public offering of Leap Stock which became effective at the time of the June 15, 2001 prospectus forming part of the Leap Registration Statement; (2) part of a registered secondary public offering of such Leap Stock made by means of said Registration Statement which offering was conducted at Leap's request and insistence on a delayed basis, such that registration statement sales by UBS were taking place concurrently with Plaintiff's purchases, all within six months of the Registration Statement becoming effective; and (3) effectuated by use of the means and instruments of transportation and/or communication in interstate commerce. Whit. R. 182-83 (FARC at ¶ 96).

1. The Whittington Plaintiffs have standing to assert their Section 11 claims

Section 11(a) of the Securities Act, 15 U.S.C. 77k(a), provides an express damages action against the signer of a registration statement and the directors and partners of the issuer and others involved in the offering for making material misrepresentations and/or misrepresentations in a registration statement. Section 11 provides, in relevant part:

Appendix B

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue –
>
> (1) every person who signed the registration statement;
>
> (2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

The purpose of Section 11 is "to assure compliance with the disclosure provisions of the [Securities] Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean*, 459 U.S. at 381-82.

The Leap Defendants' claim that the Whittington Plaintiffs cannot trace their purchase of Leap Stock to the defective offering is misplaced. Section 11(a) provides that where a material fact is misstated or omitted from a registration statement accompanying a stock filing with the SEC, "any person acquiring such security" has standing to bring an action for

such. *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1079 (9th Cir. 1999) (quoting 15 U.S.C. § 77(a)). "The limitation on 'any person' is that he or she must have purchased 'such security.' Clearly, this limitation only means that the person must have purchased a security issued under that, rather than some other, registration statement." *Id.* at 1080. "Section 11 does not require the securities be purchased directly in the offering; rather, 'to have standing under section 11, one must simply be able to trace the purchase of his securities to the registration statement that allegedly violated section 11 by containing a material misrepresentation or omission.'" *In re Friedman's, Inc. Securities Litigation,* 385 F. Supp. 2d 1345, 1371 (N.D. Ga. 2005) (*citing In re JDN Realty Corp. Sec. Litig.*, 182 F. Supp. 2d 1230, 1244 (M.D. Ga. 2002). Even a cursory review of the Prospectus and Registration Statement shows that Leap Defendants' argument is without merit.

The case involves an extremely ***unique*** factual scenario in that this Registration Statement was filed for the ***sole purpose*** of selling the Leap Stock from AWG to the Whittington Plaintiffs and other members of AWG. Whit. R. 157-58 (FARC at ¶ 54). In fact, the plan was always for the members of AWG to hold the Leap Stock. This was discussed prior to the closing on June 8, 2001, with Leap officer Robert Anselmo, and Leap Defendant James Hoffman, as well as counsel for AWG and Leap. Whit. R. 150 (FARC at ¶ 39). Both the July 1, 2001 Prospectus and

Registration Statement explicitly state, "This prospectus relates to the offer and sale of up to 1,900,829 shares of Leap Wireless International, Inc., common stock by the selling security holder identified in this prospectus," which is exactly the amount of Leap Stock AWG received from the Agreement. Whit. R. 625. Further, the prospectus states:

> The shares offered by this prospectus were originally issued by us to the selling security holder [AWG] in connection with our acquisition of wireless licenses from the selling security holder, subject to the terms of an agreement for purchase and sale of licenses, dated February 7, 2001. Under the terms of the purchase agreement, we agreed to register for resale the shares of our common stock offered by this prospectus . . . We agreed to keep the registration statement effective for a period ending upon the earlier of the one year anniversary of the effective date of the registrations statement of which this prospectus forms a part or such time as the selling security holder advises us that it has completed the resale of the shares of common stock offered by this prospectus.

Id.

Moreover, as discussed above, the Leap Defendants knew that the Whittington Plaintiffs would be repurchasing the Leap Stock that was issued directly to AWG pursuant to the Agreement. Whit. R. 150 (FARC at ¶ 39). Because many of the Whittington

Plaintiffs were not accredited investors, the Leap Stock had to be initially transferred to AWG for the purpose of reselling it to the Whittington Plaintiffs. *Id.* In addition, the Whittington Plaintiffs purchased the Leap Stock virtually simultaneously as AWG sold it and AWG purchased it directly from Leap. Whit. R. 104 (FARC at ¶4). Obviously, under these unique facts, which must be taken as true, the Whittington Plaintiffs' purchase of the Leap Stock is traceable to the Prospectus and Registration Statement.

Another allegation in the Complaint, which must be taken as true for purposes of the Leap Defendant's Motion is that:

> In every sense, therefore, Leap was selling its Stock to [AWG's] members, including the Plaintiffs, but to work around the accredited investor problems, Leap cast the transaction as the series of steps set out above. In substance, however, ***Leap was the "seller" of the Leap Stock that Plaintiffs acquired*** and are here suing upon, and the Defendants were aiders/abettors and control persons of Leap as the "seller."

Whit. R. 151 (FARC at ¶ 39(c)) (emphasis added). In addition, the Whittington Plaintiffs' Complaint alleges that each of the purchases of Leap Stock at issue was "made pursuant to a registered public offering of Leap Stock which became effective at the time of the June 15, 2001 prospectus forming part of

the Leap Registration Statement, . . . " Whit. R. 182 (FARC at ¶ 96).

As held in *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 585 (W.D. Tex. 2002), "aftermarket purchasers who can trace their purchases to the misleading registration statement have standing to sue." Therefore, the Leap Defendants' argument that the Whittington Plaintiffs shares are not traceable to the Registration Statement and Prospectus is simply without merit. *In any event, tracing is a fact-intensive inquiry which cannot be resolved on a preliminary dismissal motion, where no discovery has yet occurred.* At the pleading stage, "[p]laintiffs have not been required to explain how their shares can be traced; general allegations that plaintiff purchased 'pursuant to' or traceable to a false registration statement have been held sufficient to state a claim." *In re Global Crossing Ltd. Securities Litigation,* 313 F. Supp. 2d 189, 207 (S.D.N.Y. 2003) (citing *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272 (3rd Cir. 1992); *In re Crazy Eddie, Sec. Litig.*, 747 F. Supp. 850, 854-55 (E.D.N.Y. 1990); *In re AES Corp. Sec. Litig.*, 825 F. Supp. 578, 592 (S.D.N.Y. 1993); *Neuberger v. Shapiro,* Fed. Sec. L. Rep. 90, 261, 1998 WL 408877 at *2 (E.D. Pa. 1998). The court in *In re Immune Response Securities Litigation,* 375 F. Supp. 2d 983 (S.D. Cal. 2005), held that plaintiffs' complaint, which merely alleged that "Plaintiffs and the other members of the Class purchased or otherwise acquired IRC shares pursuant to the defective Registration Statement and

Prospectus" provided sufficient grounds for a presumption of standing and denied the defendants' motion to dismiss. *Id.* at 1039; *see also Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 286 (3rd Cir.1992) (allegation that plaintiff purchased the shares "pursuant to the [offering]" held sufficient to defeat motion to dismiss section 11 claim); *Central Laborers' Pension Fund v. SIRVA, Inc.*, 2006 WL 2787520 (N.D. Ill. 2006) (allegation that plaintiff purchased stock "issued pursuant or traceable to the [offering]" was sufficient to put plaintiff in the class of investors covered by Section 11); *accord In re LILCO Sec. Litig.*, 111 F.R.D. 663, 671 (E.D.N.Y. 1986) ([T]racing is a question of fact reserved for trial.").

2. The Leap Defendants Caused the June 2001 Registration Statement to be False and Misleading because they Failed to Disclose the Risks Associated with the MCG Acquisition

Although the Leap Defendants argue that they properly disclosed that: (1) additional share issuances would dilute the value of Leap Stock; (2) at the time of the Registration Statement and Prospectus, MCG and Leap were embroiled in a dispute related to their contractual relationship and that arbitration proceedings had been initiated to determine the amount of additional Leap Stock being issued to MCG; and even that (3) the MCG contract created a significant risk

that Leap's existing covenants in its lending and financial arrangements would be violated which would accelerate Leap's debt and force it into bankruptcy (Leap Defendants' Opening Brief at pp. 25-29), when the boiler plate language upon which this argument is based is exposed, it is clear that this argument has no merit.

The Whittington Plaintiffs claims arise from omissions of material facts. Such omissions included that on September 1, 2000, Leap had entered into a contract with MCG obligating Leap to pay consideration which would create material risks of dispute, litigation and severe adverse effects on Leap and Leap's other shareholders besides MCG. Whit. R. 174-75 (FARC at ¶ 74(a)). In addition, the Leap Defendants' omissions included a failure to disclose the fact that a material dispute had arisen between Leap and MCG regarding the amount of form of the consideration owed under the September 1, 2000 contract to MCG. Whit. R. 174 (FARC at ¶ 74(b)). Further, such omissions included that the Leap Defendants had caused to be created, in such arrangement with MCG, a material risk that the effective working control of Leap could (and ultimately would) change hands. Whit. R. 174 (FARC at ¶ 74(d)).

An omitted fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See TSC Indus., Inc. v. Northway,*

Inc., 426 U.S. 438, 449 (1976); *Kronfeld v. Trans World Airlines, Inc.*, 832 F.2d 726, 731 n. 11 (2d Cir. 1987); *Geiger v. Solomon-Page Group, Ltd.*, 933 F. Supp. 1180, 1184 (S.D.N.Y. 1996). *Hinerfeld v. United Auto Group*, 1998 WL 397852, *4 (S.D.N.Y. July 15, 1998). Additionally courts have held that boilerplate language, similar to the statements the Leap Defendants argue are disclosures, is not an adequate disclosure. "[A] vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections. . . ." *In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357, 371-372 (3rd Cir. 1993). *See also La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 850-851 (11th Cir. 2004).

a. The Leap Defendants did not adequately disclose that the MCG Arbitration would completely dilute the value of the Leap Stock.

The Leap Defendants disingenuously argue that the Registration Statement disclosed, "YOUR OWNERSHIP INTEREST IN LEAP WILL BE DILUTED UPON ISSUANCE OF SHARES WE HAVE RESERVED FOR FUTURE ISSUANCE," was an adequate warning of the possible catastrophic effects of the MCG arbitration. Whit. R. 604. This "disclosure"

is nothing more than boilerplate language which does not even mention let alone adequately disclose the likely possible outcome of the then-pending MCG Arbitration. Also, this vague language regarding the issuance of additional shares (and the other "disclosures" cited by the Leap Defendants related to the future issuance of shares) is not related to the specific risk that the MCG arbitration presented and merely represents normal risks involved with any security. This vague and ambiguous boilerplate language completely failed to warn the Whittington Plaintiffs of the risks that the MCG arbitration posed to the value of the Leap Stock at the time of the Registration Statement and Prospectus. The vague language cited by the Leap Defendants could not have "significantly altered the total mix of information made available" to the Whittington Plaintiffs. *TSC,* supra.

b. The Leap Defendants did not adequately disclose that Leap might have to pay MCG $40 million in Leap Stock.

The Registration Statement failed to disclose that Leap might have to pay $40 million in Leap Stock to MCG. The Registration Statement states:

> In the pending acquisition of wireless licenses in Buffalo and Syracuse, New York that we refer to above, the seller has asserted that based on the results of the recent

> FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we entitled to pay such additional amounts in cash or Leap common stock, at our discretion. We believe the seller's position is without merit, and ***we will vigorously defend against any claim that the seller may make in the future***.

Whit. R. 604-05. (Emphasis added). This disclosure is defective and fraudulent for numerous reasons. First, nothing is mentioned regarding the purchase price Leap originally paid for the Buffalo and Syracuse license. Thus, it is impossible for an investor to determine from this vague statement the amount that Leap would have to pay in the future if the purchase price doubled. Additionally, the disclosure, which speaks of claims that may be made in the future, was patently false and knowingly misleading because at the time of the June 2001 Registration Statement, MCG had ***already*** instigated an arbitration proceeding.

The Leap Defendants argument that the fact that Leap may have to pay MCG $40 million in stock was also disclosed in the August 14, 2001 10-Q is similarly without merit. The 10-Q on widely separated pages stated:

> In June 2001, we acquired wireless licenses in Buffalo and Syracuse, New York from

> MCG PCS, Inc., for an aggregate of $18.3 million case and $18.0 million promissory note with interest at the rate of $8.5% per annum, with principal and interest payable at maturity on June 15, 2002. MCG PCS has the right to convert $11.0 million of the note at maturity into shares of our common stock at $45.825 per share, or 240,043 shares. The note is secured by a wholly owned subsidiary of Leap that owns wireless license.

(Whit. R. 725) and then nearly five pages later stated:

> In connection with our recent acquisition of wireless licenses in Buffalo and Syracuse, New York that closed in June 2001, the seller has asserted that based on the results of the recent FCC auction of wireless licenses, it is entitled to a purchase price adjustment that would result in the purchase price being effectively doubled. The parties are in the early stage of an arbitration concerning this claim. Under the terms of the agreement, if we are obligated to pay a purchase price adjustment, we are entitled to pay such additional amount in case or Leap common stock, at our discretion. We believe the seller's position is without merit, and we will vigorously defend against the claim.

Id. at p. 730.

However this 10-Q, which was made ***after*** the June 2001 Registration Statement and Prospectus, contained

no other disclosures about MCG, the true nature of the terms of Leap's agreement with MCG, nor the true nature of the risks if MCG won the arbitration. These limited and vague disclosures are widely separated and do not even cross-reference each other. Whit. R. 154-155 (FARC at ¶ 49). Moreover, even if a reader was able to put these two widely-separated statements together, it was only disclosed that less than 500,000 shares would be involved, not the 21 million shares that were actually involved. Also, the disclosure fraudulently states that the debt is **fully secured**.

These statements were not only patently false, but also completely inadequate as they did not "significantly alter[ ] the total mix of information made available" to the Plaintiff. *TSC,* 26 U.S. at 449. Nowhere did Leap ***EVER*** adequately disclose the possible (and eventual) disastrous effects of the MCG deal.

c. The Leap Defendants failed to adequately disclose that the MCG contract could and did violate Leap's restrictive lending covenants.

The Leap Defendants wrongfully attempt to state that the Whittington Plaintiffs' Complaint only alleges claims that Leap failed to disclose its restrictive covenants in its debt instruments. Actually, the Complaint alleges that Leap did not disclose that the MCG deal could and did place Leap in violation of its restrictive loan covenants. Whit R. 152-54. The only

alleged disclosures the Leap Defendants can cite to are contained within the boilerplate language that did not adequately warn the Plaintiffs of the potential effect that the MCG deal would have in causing Leap to violate its lending covenants and be thrown into bankruptcy. There is absolutely no indication that that the effective ownership and control of Leap could change to MCG and the 10-Q is absolutely silent as to the fact that if the ownership and/or control of Leap changed, because of the MCG arbitration, Leap would be in violation of its covenants in its largest debt instruments. Whit. R. 725; 730. As demonstrated above, the vague and ambiguous disclosures are woefully inadequate boilerplate language that does not insulate the Leap Defendants from liability. *See generally Saltzberg v. TM/Sterling/Austin Associates*, 45 F.3d 399, 400 (11th Cir.1995); *In re Trump Casino Securities Litigation*, 7 F.3d at 371-72 ("Simply put, the disclaimers were not explicit or specific as to the fraud alleged by the [plaintiffs], and therefore did not put them on actual notice."); *see, also, In re World-Com, Inc. Securities Litigation*, 294 F. Supp. 2d 392, 430 (S.D.N.Y. 2003).

B. The Whittington Plaintiffs Asserted Viable Claims Under Section 15 of the 1933 Act.

The Whittington Plaintiffs asserted a viable claim under Section 15 because Plaintiffs have clearly demonstrated that the Leap Defendants are liable

under Section 11. The Leap Defendants controlled Leap as they were its officers and directors. Whit. R. 126-42; 187 (FARC at ¶¶ 17-29; 97). The Leap Defendants are clearly liable under Section 15, which states:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement and understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall be jointly and severally with and to the same extent as such controlled person is liable . . .

The standard for a controlling person is provided by the Code of Federal Regulations which states: "'control' . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 958 (11th Cir. 1981) (citing 17 C.F.R. § 230.405(f) (1979)).

In the Fifth Circuit, a claimant need not even allege, much less prove, that a defendant actually participated in a wrongful transaction in order to state a claim for "controlling persons" liability. *See G.A. Thompson & Co.* 636 F.2d at 958 (5th Cir. 1981) ("Neither this definition [17 C.F.R. § 230.405(f)

(1979)] nor the statute appears to require participation in the wrongful transaction. Fifth Circuit case law appears to follow the plain meaning of the statute in this respect.") The Leap Defendants were the control group of Leap within the meaning of Section 15 of the 1933 Securities Act. Controlling persons liability is a broad concept, designed to broaden culpable violators of securities laws. "[T]he 'controlling person' provisions [of § 15] were enacted to expand, rather than restrict, the scope of liability under the securities laws." *SEC v. Mgt. Dynamics, Inc.*, 515 F.2d 801, 812 (2d Cir. 1975).

> The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists.

Loss & Seligman, Fundamentals of Securities Regulation, Ch. 5 B at 461 (quoting H.R. Rep. No. 85, 73d Cong, 1st Sess. 14 (1933) (in reference to definition of underwriter). Simply stated, the Plaintiffs have alleged more than sufficient facts to demonstrate that all of the Leap Defendants, including former outside directors Jarvis[3], Targoff[4], Dynes[5], Williams[6], Chase[7]

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[3] The Complaint alleges that Jarvis developed the concept for Cricket (Leap's business format) with Defendant Williams. Whit. R. 128-29 (FARC at ¶18). Also, through June 2000, Jarvis was a director of Cricket, a Leap subsidiary. *Id.* at ¶ 129. Jarvis was also a member of Leap's Audit Committee. *Id.* at 127. In

(Continued on following page)

and Barad[8] controlled Leap. It is important to note that all of these Defendants signed the June 2001 Registration Statement in their role as a Director. Whit. R. 648-50. In addition, there are sufficient allegations in the Complaint against Defendants Pegg[9] and Stephens[10]. The Complaint clearly alleges

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addition, Jarvis personally participated in negotiations and/or dealings between Leap and AWG. *Id.*

[4] The Complaint alleges that Targoff served as a director of Leap since 1998 and served on Leap's Audit Committee and possessed a significant interest in Leap. Whit. R. 136 (FARC at ¶ 23).

[5] The Complaint alleges that Dynes served as a director of Leap since 1999 and was partially responsible for approving the generous compensation packages of various other Defendants. In addition, Dynes owned beneficial ownership of 17,000 shares of Leap stock. Whit. R. 138 (FARC at ¶ 25).

[6] The Complaint also alleges that Williams served as a director of Leap since 1998 and served on the audit committee. Further, Williams developed the Cricket concept (Leap's business format) with Defendant Jarvis. Whit. R. 132-34 (FARC at ¶21). Also, Williams is a director of Cricket, a Leap subsidiary. *Id.*

[7] The Complaint also alleges that Chase served as a director of Leap since 2000, sold a telecommunications company to Leap, retained large amounts of Leap Stock and warrants and worked as a consultant of Leap and was compensated $250,000 per year. Whit. R. 134-36 (FARC at ¶ 22).

[8] The Complaint also alleges that Barad served as a director of Leap since 2000, sat on Leap's Audit Committee and owned a significant interest in Leap. Whit. R. 137-38 (FARC at ¶ 24).

[9] Additionally, the Complaint alleges that Pegg served as Senior Vice President, Public Affairs of Leap since 1998 and was

(Continued on following page)

that these defendants held senior level positions at Leap, received large compensation packages, and owned a significant interest in Leap. Whit. R. 141-42 (FARC at ¶¶ 28-29). Thus, the allegations must be taken as true, *see Scaggs*, 931 So. 2d at 1275, and Plaintiff has properly asserted Section 15 claims against all of the Leap Defendants as control persons of Leap.

Furthermore, "[c]ontrol is a question of fact" not to be "resolved summarily at the pleading stage." *Brumbaugh v. Wave Systems Corp.*, 416 F. Supp. 2d 239, 259 (D. Mass. 2006). As is demonstrated above, there are numerous factual disputes as to essential elements of control person liability; thus, the Circuit Court's denial of the Leap Defendants' Motion must be affirmed.

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directly responsible for reviewing and auditing all company reports to shareholders and SEC filings. In addition, Pegg held beneficial ownership of 75,805 shares of Leap stock. Whit. R. 141 (FARC at ¶ 28).

[10] The Complaint also alleges that Stephens serves as Vice President, Human Relations for Leap since 1998. Whit. R. 141-42 (FARC at ¶29). Further, Stephens held beneficial ownership of and/or control 116,062 shares of Leap Stock. *Id.*

C. The Whittington Plaintiffs stated viable claims under § 75-71-717(a)(2) of the Mississippi Securities Act.

The Leap Defendants' argument that Plaintiffs have failed to state an actionable claim under the Mississippi Securities Act ("MSA") is also without merit. The Leap Defendants are liable to the Plaintiffs based upon § 75-71-717(a)(2), together with the material participation and aider/abettor liability provision of § 75-71-719 because the Leap Defendants sold the Leap Stock to Plaintiffs by using materially false oral and written communications. §75-71-717(a)(2) states:

> Any person who . . . offers or sells a security by the use of any written or oral communication which contains any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission) . . . is liable to the person buying the security from him . . .

Miss. Code Ann. § 75-71-717(a)(2). Simply stated, a person who misrepresents or fraudulently sells a security is *liable* to the purchaser of the security. *Geisenberger v. John Hancock Distributors, Inc.*, 774 F. Supp. 1045, 1050 (S.D. Miss. 1991). Section 717(a)(2) parallels section 12(a)(2) of the 1933 Securities Act, which makes liable any person who:

> offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

15 U.S.C. § 771(a)(2) (Supp. V 1999). Section 717(a)(2) is broader than section 12(a)(2) in two important ways. First, section 717(a)(2) is not limited to only those securities sold "by means of a prospectus or oral communication." Second, section 717(a)(2) is not limited to only those securities sold "by the use of any means or instruments of transportation or communication in interstate commerce or of the mails."

Plaintiffs alleged all the *necessary* elements of a claim under both sections. Whit. R. 172-82 (FARC at ¶¶ 71-93). The Leap Defendants' argument that they are not liable under the MSA is completely disingenuous. According to the factual allegations of the Complaint (which must be taken as true for purposes of the Leap Defendants' Motion), during the relevant time period, the Leap Defendants, acting in concert

with the Co-Conspirators carried out a plan, scheme and course of conduct which was intended to and did: (1) offer or sell a security; (2) by means of any written or oral communication; (3) which contained an untrue statement of material fact, or omitted a material fact necessary to make those statements that were made, in light of the circumstances in which they were made, not misleading; and (4) the Plaintiffs did not know, nor could they have known in the exercise of reasonable care, of the untruth or omission. Whit. R. 173 (FARC at ¶ 74).

1. Loss causation is an issue of fact for trial.

The Leap Defendants also make the incredulous argument that their Motion should be granted because they claim that the Plaintiff's losses were not caused by the material misrepresentations and omissions at issue here. The Leap Defendants claim that the Plaintiffs' losses were instead caused by general market conditions and the technology downturn that allegedly existed at the time. The disputed cause of Plaintiffs' losses should not be resolved without a trial. Moreover, the Complaint clearly alleges (which must be taken as true) that Plaintiffs suffered damage as a result of the material misrepresentations and omissions of Leap Defendants.

Furthermore, loss causation is not required under the MSA. The Leap Defendants cite to *Geisenberger v.*

John Hancock Distribs., Inc., 774 F. Supp. 1045, 1051 (S.D. Miss 1991) for the proposition that "loss causation" is required under Section 717(a)(2). However, as commentators have noted, that case erroneously injected a 10b-5 standard into the MSA:

> Geisenberger appears to make a number of errors in its assessment of the MSA, owing to the district judge's dogged attempt to analogize section 717(a)(2) to Rule 10b-5, rather than to section 12(a)(2), with which section 717(a)(2) has much more in common. See supra note 110. Consequently, the Geisenberger court erroneously imported the Rule 10b-5 "loss causation" element into his section 717(a)(2) analysis. *See Geisenberger*, 774 F. Supp. at 1051. Fortunately, while Judge Barbour appears to have been doctrinally wrong in implying reliance and loss causation elements into a section 717(a)(2) claim, he found sufficient facts in the case at bar to satisfy both putative elements. *See id.* As a net result, his holding was the same as it should have been absent the two misplaced elements.

70 Miss. L.J. 683, n. 141 (2000).

Section 75-71-717(a)(2) is analogous to Uniform Securities Act (1956) § 410(a)(2).[11] Furthermore,

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[11] Section 410(a)(2) is identical to Mississippi's Section 717(a) and states: "(a) Any person who . . . (2) offers or sells a security by means of any untrue statement of a material fact or

(Continued on following page)

Section 410(a)(2) parallels 12(a)(2) of the 1933 Securities Act. A plain reading of the statutory language of "Section 410(a) of the Uniform Securities Act shows no explicit loss causation requirement" Joe Long, 12A Blue Sky Law § 9:117.39 (2006). Furthermore, the section has ***not*** "been held to **imply** a loss causation requirement." *Id.* (emphasis in original). Treatise material regarding this area have noted that "the omission of a loss causation element in . . . Uniform Securities Act, Section 410(a)(2) was intentional, **not an oversight.**" *Id.* (emphasis in original). "Unlike SEC Rule 10b-5, where the emphasis is on awarding the investor the difference between the value of the securities as sold and their actual value at that time, Sections 12(2) and 410(a)(2) are aimed at setting the transaction aside and returning the parties to their status **before** the transaction was entered into." *Id.* (emphasis in original). As a result, it is well-settled in the states which have adopted the Uniform Securities Act that loss causation is not an element that must be proven or alleged. *See, e.g., Dunn v. Borta*, 369 F.3d 421, 432 (4th Cir. 2004) (holding that causation was not an element in Uniform Securities Act and refusing to imply that it is an element); *Kirchoff v. Selby*,

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any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . . "

703 N.E.2d 644 (Ind. 1998); *Hines v. Data Line Sys. Inc.*, 787 P.2d 8, 12-13 (Wash. 1990) (A plain reading of the [Uniform] Securities Act demonstrates that a decline in the market value of the stock is not an element of a [Uniform Securities Act violation. [Section 410(a)(2)] makes it unlawful for a seller to make a material misrepresentation or omission in connection with the sale of a security. The violation is in the misrepresentation itself; it is not how the misrepresentation affected the price of the stock [Section 410(a)] provides rescission as the basic remedy. Thus an investor who is wrongfully induced to purchase a security may recover his investment without any requirement of showing a decline in the value of the stock); *Klein v. Boyd*, 1996 WL 675554 (E.D. Pa. Nov. 19, 1996) rev'd on other grounds; *Lolkus v. Vaderwilt*, 141 N.W.2d 600, 603 ("as in common law rescission, the buyer need not shown any causal connection between the violation and his loss, nor need he be able to show a loss.").

Even the non-Uniform Securities Act states that have similar civil liability provisions against misrepresentations and omissions "have concluded that **loss causation is not** an element of recovery under their statutes. Long, 12A Blue Sky Law at § 9:117.45 (emphasis in original); *see also, E.F. Hutton & Co. Inc. Rousseff*, 537 So. 2d 978, 981 (Fla. 1989); *Lucas v. Downtown Greenville Investors L.P.*, 671 N.E.2d 389 (Ill. App. 1996).

Furthermore, Plaintiffs are seeking, *inter alia*, rescissionary damages, alleging that but for the Leap Defendants' fraud they would have never purchased the Leap stock. With regard to such damages the US Supreme Court stated:

> We may therefore infer that Congress chose a rescissory remedy when it enacted § 12(2) in order to deter prospectus fraud and encourage full disclosure as well as to make investors whole. Indeed, by enabling the victims of prospectus fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud.

Randall v. Loftsgaarden, 478 U.S. 647, 659 (1986).

2. Leap Failed to Disclose Materially Adverse Facts to the Whittington Plaintiffs

As discussed above, (*see supra* Section A2 at pp. 25-29), and as alleged in the Complaint, the Leap Defendants failed to disclose that: (1) on September 1, 2000, Leap had entered into a contract with MCG obligating Leap to pay consideration (contingent or otherwise) which would create material risks of dispute, litigation and severe adverse effects on Leap and Leap's other shareholders besides MCG; (2) a material dispute had arisen between Leap and MCG

regarding the amount of form of the consideration owed under the September 1, 2000 contract to MCG, and providing exact and quantitative details of the issues and amounts at risk in the controversy, especially amounts claimed by MCG or for which Leap was otherwise potentially at risk (i.e., at no time before approximately August 2002 did Defendants or Leap disclose anything remotely like 21 million shares of Leap Stock being at risk); (3) the details of MCG's demands and positions being taken in the arbitration of such dispute, and the risks (with a quantification of amounts) to Leap of losing in such proceeding; (4) the Defendants had caused to be created, in such arrangement with MCG, a material risk that the effective working control of Leap could (and ultimately would) change hands; (5) the MCG contract (which predated the Plaintiffs' purchases by approximately a year) created the basis for a massive dilution or "watering" of the Leap Stock first acquired by AWG in June 2001 and then acquired by Plaintiffs in the fall of 2001 in the "buy back" arrangement described above; (6) the MCG contract created a significant risk that Leap's covenants in its lending and financing arrangements would be violated and the other adverse consequences would occur, that have now indeed occurred; and (7) the risks from such MCG contract, and the resulting dispute and the arbitration, included potential bankruptcy of Leap. Whit. R. 173-75 (FARC at ¶ 74). Furthermore, there were material misrepresentations in the Registration statement signed by the Leap Defendants including,

but not limited to the following: (1) Shareholder equity was misstated and/or not properly footnoted, to reflect the impact of the issuance of up to 21,021,431 shares of Leap Stock to MCG; (2) Statements as to shares reserved for future issuance did not properly reflect the potential amounts of issuance of up to 21,021,431 shares of Leap Stock to MCG; (3) Per-share amounts, including earnings, were misstated and/or not properly footnoted, to reflect the impact of the issuance of up to 21,021,431 shares of Leap Stock to MCG; (4) Leap's descriptions of financing arrangements were inaccurate, and conveyed a misleading impression that Leap had no looming risks of covenant defaults from the MCG contract and the dispute and (5) Leap's uninformative mentions of an "arbitration" in certain reports from mid-2001 through the spring of 2002 did not tie back to MCG and gave a wholly understated, misleading picture of the dispute, and gave a misleading impression that the result of such proceeding would not be material to Leap. Whit. R. 175-76 (FARC at ¶ 75).

3. Scienter is not an element of Miss. Code Ann. § 75-71-717(a)(2)

The Leap Defendants wrongfully argue that the Whittington Plaintiffs are required to plead that the Leap Defendants acted with the requisite scienter. The Leap Defendants are clearly mistaken because a cause of action under these provisions does *not* require *pleading* or *proof* of a *defendant's scienter*. *See*

Appendix B

Fortenberry v. Foxworth Corp., 825 F. Supp. 1265 (S.D. Miss. 1993). In *Fortenberry* a Mississippi federal court was called upon to determine the applicable statute of limitation for § 10b and Rule 10b-5 claims in Mississippi. In so doing, that court analyzed the Mississippi Blue Sky Laws and recognized that "[n]either § 501 nor § 717 requires the element of scienter. Common law fraud requires the element of scienter, as do Rule 10b-5 actions in the wake of the Supreme Court's opinion in *Ernst and Ernst v. Hochfelder*," *Id.* at 1279-1280.

The Leap Defendants cite *Russell v. Southern Nat'l Foods, Inc.*, 754 So. 2d 1246 (Miss. 2000) for the proposition that Section 717 requires plaintiffs to plead that defendants engaged in intentional or deceptive conduct. However, the issue in Russell was not the requisite pleading standard of Section 717(a)(2), which as noted above is based upon Section 12(a)(2,), which contains no scienter element. In fact, the Mississippi Supreme Court has never been called upon to determine whether section 717 requires the element of scienter. Rather, in dicta, the *Russell* court cited to *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) for the proposition that allegations of securities fraud (which can be brought pursuant to many different statutes with many different pleading requirements) required pleading of intentional or deceptive conduct. However, *Hochfelder* concerned actions under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5, not Section 717. In fact,

although *Hochfelder* held that scienter was required to state a claim under § 10(b) of the 1934 Act and Rule 10b-5, it also noted that scienter was not required under § 12(2) of the 1933 Act, and actually supported that holding by noting that § 12(2) "allow[s] recovery for negligent conduct." *Hochfelder*, 425 U.S. at 188 & n. 27. *See also, Kronenberg v. Katz*, 872 A.2d 568, 600 (Del.Ch. 2004). As Section 717 is identical to Section 12(2), it is clear that scienter is not a requirement.

In general, under blue sky laws, like the MSA and unlike at common law, scienter is not a necessary element of a fraud action. 18 Am. Jur. 2d *Corporations* § 117, n.9. In exploring scienter in the context of state securities laws, the following is noted:

> **The lack of scienter as an element of a civil action for securities fraud distinguishes the blue sky laws from the federal securities laws.** Under the federal securities laws, in an action for securities fraud under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, scienter must be shown before recovery will be permitted in a private civil action, although the degree of scienter is the subject of some disagreement. **While some blue sky jurisdictions have mentioned the federal cases in passing, it is generally accepted that the reasoning by which the federal courts have held that the federal securities laws require a**

> **showing of scienter does not apply to actions brought under the blue sky laws.** At least part of the reason for this is that the antifraud provisions of the blue sky laws are patterned after § 12 of the Securities Act of 1933 rather than § 10(b) and SEC Rule 10b-5.

69A Am. Jur. 2d *Securities Regulation – State* § 186 (emphasis added). As discussed above, Section 75-71-717 is analogous to Uniform Securities Act (1956) § 410(a)(2) and Section 717 should be "construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation." Miss. Code Ann. §§ 75-71-103 and 75-71-717. Accordingly, case law from states that have adopted the Uniform Securities Act is persuasive, and the states that have addressed the issue overwhelmingly hold that scienter is not an element to a civil liability claim under the Uniform Securities Act. *See*, citations and discussion *infra*.

Furthermore, Section 410 parallels 12(a)(2) of the 1933 Securities Act, which does not require a showing of scienter. *See, Fortenberry v. Foxworth Corp.*, 825 F. Supp. 1265, 1279 ("Neither § 501 nor § 717 [of Mississippi Securities Act] requires the element of scienter") (S.D. Miss. 1993); *Burgess v. Premier Corp.*, 727 F.2d 826, 833 (9th Cir. 1984) (Scienter is not required under Washington [Securities Act]); *Gaudina v. Haberman*, 644 P.2d 159 (Wyo. 1982);

Kittilson v. Ford, 608 P.2d 264 (Wash. 1980); *Merrill Lynch Pierce Fenner & Smith v. Byrne*, 320 So. 2d 436 (Fla. App. 1975); *Sprangers v. Interactive Techs. Inc.*, 394 N.W.2d 498, 503 (Minn. App. 1986); *In re Tyco Intern., Ltd.*, 2004 WL 2348315, *15 ((D.N.H. 2004) (Neither § 11 nor § 12(a)(2) requires an allegation of scienter.); *In re Adams Golf, Inc. Securities Litigation*, 381 F.3d 267, 274 (3rd Cir. 2004) (Sections 11 and 12(a)(2) are virtually absolute liability provisions, which do not require plaintiffs to allege that defendants possessed any scienter. (*citing, Huddleston*, 459 U.S. at 382.)); *Benak v. Alliance Capital Management L.P.*, 349 F. Supp. 2d 882, 888 (D. N.J. 2004) (" . . . sections 11 and 12(a)(2) contain no scienter requirement . . . "). Long recognizes that "whether scienter is required under Section 410(a)(2) of the Uniform Act in those states which incorporate Section 101 will depend upon which part of Section 101 is relied upon to impose civil liability." 12A at § 9:136. Mississippi does incorporate Section 101 in its securities act, therefore scienter is not required if civil liability is based upon Miss. Code Ann. §§ 75-71-501(2) or (3).[12]

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[12] Miss. Code Ann. §§ 75-71-501 . . .

(2) "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

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Commentators have noted that the Mississippi Securities Act does not require a showing of scienter:

> Nor does the section 717(a)(2) require the buyer to prove that the seller knew the representation was false or made it without regard to its truth or falsity with the intent that the buyer rely upon it – as is required to show common law fraud or a Rule 10b-5 violation.

70 Miss. L.J. 683, 719-20 (2000).

Furthermore, despite the fact that scienter is not a required element under Section 717, Plaintiffs nonetheless have pled scienter. The Plaintiffs' Complaint states:

> Each Defendant listed in this complaint was, during the relevant time periods specified, aware of the material omitted facts described in the fact section of this Complaint and of the further fact that such material omitted facts were not being disclosed to the Plaintiff, and that the activities of such Defendant were assisting Leap, its officers, its directors and affiliates, and the Co-Defendants named herein, to create, perpetrate and continue the wrongful, deceptive and fiduciary-duty-breaching schemes and fraudulent courses of business alleged herein. But for the activities of the Defendants, the losses of Plaintiffs would not have occurred. Each defendant knew and intended that the material omitted facts were not being disclosed to Plaintiffs,

and acted ***with the requisite degree of knowledge or scienter***, intending thereby to induce Plaintiffs to pay Plaintiff's money for the Leap Stock under circumstances of not knowing the material omitted facts. Defendants, in their commission of, and in their participation in, and in their authorization or direction of, the wrongs alleged above, acted or omitted to act intentionally or in reckless disregard for the truth, or else acted or omitted to act knowingly or willfully, and in any event they acted or omitted to act with intent to do the acts done (or to omit to do the acts needed to be done as outlined herein) or, as to acts not done by any particular Defendants, with the intent or knowledge that such acts would be done by the other Defendant, control person, or co-conspirator thereof who did in fact perform such act or omission, or who materially aided the primary wrongdoers.

. . .

All of Defendants, who were in possession of the material undisclosed facts and ***willfully or knowingly*** or recklessly ***concealed them***, acting in concert and conspiracy, engaged in the aforesaid omissive, and therefore ***deceptive and manipulative and fraudulent, acts***, practices and courses of business with the intent to take advantage of the position of inferior knowledge and ignorance of the true facts on the part of the Plaintiffs, and in order to take advantage of

> Plaintiffs" trust and confidence in the Defendants, and with ***the intent to defraud the Plaintiffs***, and with a profit-seeking motive on the Defendants' part.

Whit. R. 189; 191 (FARC at ¶ 110; 112) (Emphasis added).

D. The Whittington Plaintiffs' Common Law Fraud Claims are Actionable

The Whittington Plaintiffs alleged that the Leap Defendants committed fraud by inducing the Whittington Plaintiffs to purchase the Leap Stock on the front end, and then by inducing them to hold onto the Leap Stock. Moreover, the Whittington Plaintiffs alleged that acting with full knowledge of Leap's true financial condition and forecast, the Leap Defendants, engaged in the course of fraud, manipulation and deception described above. The Whittington Plaintiffs make separate and independent claims under the Mississippi blue sky laws and common law, fraud.

These actions are actionable fraud, pursuant to a number of applicable tort law principles, among which are the following:

> *Restatement of Torts (Second), sec 525*: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or *to refrain from action* in reliance upon it, is subject to

> liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." (Emphasis added.)
>
> *Restatement of Torts (Second), sec 531*: "One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to *refrain from action* in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced." (Emphasis added.)
>
> *Restatement of Torts (Second), sec 551(1)*: "One who fails to disclose to another a fact that he knows may justifiably induce the other to act *or refrain from acting* in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose. . . . " (Emphasis added.)

In a recent decision, the California Supreme Court held that ***both fraud and negligence*** claims can be brought where the ***claimant was caused or induced to retain or not to sell a stock***. *See Small v. Fritz Companies, Inc.*, 65 P.3d 1255 (Cal. 2003). The California Supreme Court succinctly summarized its holding as follows:

> [T]his case present[s] the issue whether California should recognize a cause of action by persons wrongfully ***induced*** to hold stock instead of selling it. (For convenience, we shall refer to such a lawsuit as a "holder's action" to distinguish it from suits claiming damages from the purchase or sale of stock.) We conclude that California law should allow a holder's action for fraud or negligent misrepresentation.

Id. at 1256-1257.

In Mississippi, the elements of common law fraud include: "(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury." *Welsh v. Mounger*, 883 So. 2d 46, 48 (Miss. 2004).

Plaintiffs here have alleged facts to adequately state a claim for common law fraud, Plaintiffs' Complaint states: (1) the representations (as set forth above); (2) their falsity (as stated above); (3) their materiality (as stated above); (4) the speaker's knowledge of its falsity or ignorance of the truth (each of the Leap Defendants "signed and/or personally approved the quarterly and/or annual reports to the SEC and to shareholders and investors . . . " Whit. R.

187 (FARC at ¶ 107)); (5) the speaker's intent that it should be acted upon by the hearer and in the manner reasonably contemplated (each of the Leap Defendants "knew and expected that their false and misleading information, and the omissions of material facts, would be conveyed to Leap Stock holders in Mississippi such as Plaintiffs" Whit. R. 187 (FARC at ¶ 107); (6) the hearer's ignorance of its falsity ("At the time of said misrepresentations and omissions, Plaintiffs were ignorant of their falsity, and believed them to be true." Whit. R. 178 (FARC at ¶ 83); (7) his reliance on its truth ("Had Plaintiffs known the truth regarding the problems that Leap was experiencing, which were not disclosed by [the Leap] Defendants, Plaintiffs would not have purchased or otherwise acquired the Leap Stock." Whit. R. 178 (FARC at ¶ 83)); (8) his right to rely thereon (the Leap Defendants "occupied a vastly superior position of knowledge and access to information than Plaintiffs" Whit. R. 187 (FARC at ¶ 107)); and (9) his consequent and proximate injury ("As a direct and proximate result of [the Leap] Defendants' wrongful conduct, Plaintiffs suffered damages in connection with its respective purchases and sales and retained holdings of Leap Stock during the relevant time period. Whit. R. 179 (FARC at ¶ 86)).

In addition, the L[illegible] Defendant's concealment of material information from the Whittington Plaintiffs also constitutes fraud under Mississippi law. Omission or concealment of material facts can constitute

misrepresentation, just as can positive, direct assertion. *Davidson v. Rogers*, 431 So. 2d 483, 484 (Miss. 1983). Under Mississippi law, a duty to disclose may exist where one voluntarily undertakes to speak but fails to prevent his or her words from being misleading, or where one party has knowledge of material facts to which the other party does not have access. *Shelter Mutual Ins. Co. v. Brown*, 345 F. Supp. 2d 645, 652 (S.D. Miss. 2004). The Whittington Plaintiffs have alleged that the Leap Defendants "were in position of vastly superior knowledge concerning Leap as compared with Plaintiffs." Whit. R. 190 (FARC at ¶ 111). Furthermore, the Complaint alleges that the Leap Defendants induced the Whittington Plaintiffs to purchase and hold Leap Stock through their misrepresentations and omissions. The Whittington Plaintiffs have also alleged direct and actual reliance. As control persons and their positions as insiders in possession of superior knowledge of Leap's true financial picture, the Leap Defendants had an affirmative duty to speak. "A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation. Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue." *Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 425-426 (1941) (citations omitted).

Appendix B

CONCLUSION

As shown above, no party – Defendant or Plaintiff – signed an agreement to arbitrate the claims at issue, as such, those claims cannot be compelled to arbitration. In addition, the Whittington Plaintiffs have clearly met their pleading requirements and when all the facts in their Complaint are taken as true, as they must be, the Whittington Plaintiffs have stated claims upon which relief can be granted. Therefore, the orders of the Circuit Court of Hinds County denying the Leap Defendants' Motions to dismiss or in the alternative to compel arbitration should be affirmed.

Done this the 20th day of February, 2007.

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I hereby certify that I have filed with the Clerk of the Mississippi Supreme Court **Brief of The Whittington Plaintiffs (Appellees) In Response To Brief of Appellant Leap Defendants** by depositing for delivery via Federal Express an original and three copies of the foregoing and have served a copy of the foregoing upon counsel of record by placing a copy of same in the United States mail, first class postage prepaid, or other method indicated and addressed as follows:

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Appendix C

APPENDIX C – REPLY BRIEF OF WHITE DEFENDANTS (KNOWN BELOW AS LEAP DEFENDANTS – APPELLANTS) FILED MARCH 8, 2007

IN THE SUPREME COURT OF MISSISSIPPI

Cause No. 2005-IA-001827-SCT

QUALCOMM INCORPORATED **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01829-SCT

QUALCOMM INCORPORATED **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI HONORABLE TOMIE T. GREEN, CIRCUIT JUDGE

REPLY BRIEF OF THE LEAP DEFENDANTS (APPELLANTS)

ORAL ARGUMENT REQUESTED

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Consolidated With:
Cause No. 2005-IA-01841-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

AMERICAN WIRELESS
LICENSE GROUP, LLC **APPELLEES**

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Consolidated With:
Cause No. 2005-IA-01895-SCT

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01894

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

AMERICAN WIRELESS LICENSE GROUP, LLC **APPELLEES**

Consolidated With:
Cause No. 2005-IA-01883

HARVEY P. WHITE, *et al.* **APPELLANTS**

VS.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.* **APPELLEES**

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INTRODUCTION

The Leap Defendants' Opening Brief demonstrated that the Circuit Court erred in denying their

motions to dismiss the Original Complaint in *American Wireless License Group, LLC v. White,* Case No. 251-03-692 CIV (the "AWG Complaint") and the First Amended and Restated Complaint filed in *Whittington v. White,* Case No. 251-03-175 CIV (the "FARC"). As shown in the Opening Brief, American Wireless License Group, LLC ("AWG") and the Whittington Plaintiffs (together with AWG, "Plaintiffs") do not have standing to assert claims under Section 11 of the Securities Act of 1933; they cannot establish that their losses were caused by the Leap Defendants' alleged omissions; and the Leap Defendants disclosed all of the risks they claim were omitted from the June 2001 Registration Statement. Thus, the Circuit Court should have dismissed the AWG Complaint and the FARC pursuant to Mississippi Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

The Leap Defendants' Opening Brief also demonstrated that even if the Circuit Court correctly denied their motions to dismiss, it nevertheless should have sent the *American Wireless* and *Whittington* actions to arbitration. As shown in the Opening Brief, Section 12.11 of the Agreement for Purchase and Sale of Licenses (the "Agreement") between Leap Wireless International, Inc. ("Leap") and AWG contains a broad arbitration clause providing for arbitration of "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement;" and Plaintiffs' claims against the Leap Defendants

"aris[e] under" and "relate[ ] to" the Agreement because they are focused on the principal transactions underlying the Agreement, *i.e.*, Leap's obligations under Sections 2.1 and 2.2 of the Agreement to issue approximately 1.9 million shares of Leap stock to AWG and Leap's obligation under Section 7.4 of the Agreement to file the June 2001 Registration Statement. Thus, the Circuit Court should have ordered Plaintiffs to arbitrate their claims pursuant to the Federal Arbitration Act (the "FAA") and stayed all proceedings in the *American Wireless* and *Whittington* actions pending arbitration.

AWG responded to this showing by agreeing to arbitrate its claims. *See* Pls. Opp. at 10.[1] Indeed, AWG recently filed a motion in the Circuit Court to stay all proceedings in the *American Wireless* action pending arbitration. The Whittington Plaintiffs, by contrast, filed an Opposition to the Leap Defendants' appeals.

In the Opposition, the Whittington Plaintiffs contend that their claims are not within the scope of the arbitration clause of the Agreement. The Whittington Plaintiffs concede, however, that they are the individual members of AWG; that they have asserted *exactly* the same claims based on *exactly* the same factual allegations as AWG; that the FARC is

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[1] References to "Pls. Opp. at ___" refer to the Brief of the Whittington Plaintiffs (Appellees) in Response to Brief of Appellant Leap Defendants. References to "Open Brief at ___" refer to the Opening Brief of the Leap Defendants (Appellants).

virtually identical to the AWG Complaint; and that they are represented by the same counsel as AWG.

The Whittington Plaintiffs also contend that they have standing to assert claims under Section 11 of the Securities Act of 1933 because they can "trace" their shares to the June 2001 Registration Statement. Finally, the Whittington Plaintiffs contend that the risk disclosures in the June 2001 Registration Statement were "vague and ambiguous" and "woefully inadequate boilerplate," and that loss causation and scienter are not elements of a claim under Section 717(a)(2) of the Mississippi Securities Act (the "MSA"). As discussed more fully below, the Whittington Plaintiffs misstate the law, the facts, and the allegations of their own complaint.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTION TO DISMISS THE *WHITTINGTON* ACTION

A. The Circuit Court Should Have Dismissed The Whittington Plaintiffs' Section 11 Claims

1. The Whittington Plaintiffs Lack Legal Standing to Assert Claims Under Section 11

Section 11 of the Securities Act of 1933 provides relief to persons who purchase "a security that was

originally registered under the allegedly defective registration statement, so long as the security was indeed issued under *that* registration statement and not another." *See* Open Brief at 18 (citing authority). Thus, to have standing to assert a claim under Section 11, "a purchaser must have bought shares directly from the issuer or underwriter in the initial offering or be a secondary market purchaser who sufficiently alleges that the shares are traceable to the challenged registration statement." *In re Alamosa Holdings, Inc.*, 382 F. Supp. 2d 832, 864 (N.D. Tex. 2005).

Here, the Whittington Plaintiffs *admit* that they did not purchase their shares directly from Leap. *See* Open Brief at 20. Instead, they allege that they purchased their shares "in the public market" months after the June 2001 Registration Statement was filed. *See id.* The Whittington Plaintiffs nevertheless contend that they can "trace" their shares to the June 2001 Registration Statement because they purchased their Leap stock in the public market "virtually simultaneously as AWG sold it [in the public market]." Pls. Opp. at 24; *see also* Open Brief at 21. The Whittington Plaintiffs concede, however, that (i) at the times of their purchases, over 34 million shares of Leap stock were outstanding and being traded in the public market; (ii) Leap had issued those shares pursuant to several different registration statements going back to September 1998; and (iii) the 1.9 million shares of Leap stock Leap issued pursuant to the

June 2001 Registration Statement represented just 5½% of the 34 million shares that were outstanding and being traded in the public market at the times of the Whittington Plaintiffs' purchases. *See* Open Brief at 20-21.

As the Leap Defendants demonstrated in the Opening Brief, "[c]ourts have uniformly interpreted [Section] 11 as requiring more than a showing that a plaintiff's stock 'might' have come from the relevant offering." *See* Open Brief at 22 (quoting *In re Quarterdeck Office Sys., Inc. Sec. Litig.*, [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,092, at 98,743 (C.D. Cal. Sept. 30, 1993)). Instead, plaintiffs must be able to establish *with certainty* that the shares they purchased were issued and sold pursuant to the challenged registration statement. *See* Open Brief at 22-23 (citing authority). As the Fifth Circuit explained in *Krim v. pcOrder.com*:

> Congress conferred standing on those who *actually* purchased the tainted stock, not on the whole class of those who *possibly* purchased tainted shares – or, to put it another way, are at risk of having purchased tainted shares . . . Appellants here cannot meet the statutory standing requirement of Section 11 merely by showing that they jumped into a potentially polluted 'pool' of stock.

402 F.3d 489, 497, 500 (5th Cir. 2005).

Here, the Whittington Plaintiffs admit that they cannot establish with certainty that the shares they

purchased were issued and sold pursuant to the June 2001 Registration Statement, as opposed to the other registration statements Leap filed over the years. *See* Open Brief at 20-21. Rather, they allege that they must have acquired shares that were issued and sold pursuant to the June 2001 Registration Statement because they purchased their Leap shares in the public market "virtually simultaneously" as AWG sold its Leap shares in the public market. *See* Pls. Opp. at 24; *see* Open Brief at 20-21. As shown above, "standing cannot be based on a statistical tracing theory, *i.e.*, by showing that there is *a very high probability* that the shares can be traced to the allegedly defective registration statement" *Davidco Investors, LLC v. Anchor Glass Container Corp.*, [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,732, at 98,448-449 (M.D. Fla. Mar. 3, 2006).[2] Thus, because the Whittington Plaintiffs admit that they cannot establish with certainty that they can "trace" their shares to the June 2001 Registration Statement, their Section 11 claims must be dismissed. *See In re Global Crossing, LTD. Sec. Litig.*, 313 F. Supp. 2d 189, 207-208 (S.D.N.Y. 2003) ("Only those who purchase securities that are subject to [the] allegedly false registration

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[2] *See also Krim*, 402 F.3d at 497 ("In limiting those who can sue to 'any person acquiring such security,' Congress specifically conferred standing on a *subset* of security owners. . . To allow Appellants to satisfy the tracing requirement for aftermarket standing in this case with the proffered statistical methodology would contravene the language and intent of Section 11.").

statement, and not those who buy identical stocks already being traded, can sue under [S]ection 11.").

The cases the Whittington Plaintiffs rely upon do not change this result. *See* Pls. Opp. at 25-26. None of those cases held (or even suggested) that plaintiffs can establish standing for purposes of Section 11 by alleging that they must have purchased shares that were issued pursuant to the challenged registration statement because they purchased shares in the public market at around the same time that an offering occurred. Indeed, in *Global Crossing,* the United States District Court for the Southern District of New York rejected almost exactly the same "tracing" argument the Whittington Plaintiffs have made in this case. *See* 313 F. Supp. 2d at 207. In *Global Crossing,* plaintiffs alleged that they could "trace" their purchases of Global Crossing, Ltd. ("GC") stock to a registration statement the company filed in connection with a secondary offering because they "purchased substantial numbers of GC shares within weeks of the Secondary Offering." *Id.* The Court dismissed plaintiffs' claims, holding that they had not pleaded adequately that the shares they purchased were issued and sold pursuant to the registration statement for the secondary offering. *See id.* at 207-208. The Court explained: "[T]o have standing to assert a [S]ection 11 claim, plaintiffs must he able to 'trace their shares to an allegedly misleading registration statement.'" *Id.* at 206 (citation omitted). Here, because it is apparent on the face of the FARC

that the Whittington Plaintiffs cannot establish with certainty that their purchases are "traceable" to the June 2001 Registration Statement, the Circuit Court should have dismissed their claims. *See Alamosa Holdings*, 382 F. Supp. 2d at 864 ("[M]ere probability that a plaintiff can trace shares is clearly insufficient").

The Whittington Plaintiffs cannot salvage their claims by asserting that Section 11 standing "*is a fact-intensive inquiry which cannot be resolved on a preliminary dismissal motion, where no discovery has yet occurred.*" Pls. Opp. at 25 (emphasis in original). As the Leap Defendants demonstrated in the Opening Brief, courts routinely dismiss Section 11 claims where plaintiffs fail to allege facts showing they have proper standing. Open Brief at 22-23. For instance, in *Davidco Investors,* the Court dismissed a Section 11 claim, holding that "standing is an element of subject matter jurisdiction, which may be determined on a motion to dismiss." [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,449. Similarly, in *Alamosa Holdings,* the Court dismissed a Section 11 claim where it was "unable to locate any specific allegation that the Lead Plaintiff purchased traceable shares or any facts to support such an allegation." 382 F. Supp. 2d at 864. The Whittington Plaintiffs ignore this authority in their Opposition.

The Whittington Plaintiffs' reliance on *In re LILCO Sec. Litig.*, 111 F.R.D. 663 (E.D.N.Y. 1986), is misplaced. In *LILCO,* defendants argued on a motion

for class certification that common questions of fact did not predominate on plaintiffs' Section 11 claim because the Court would have to hold a "mini-trial" for each member of the proposed class to determine whether that plaintiff could "trace" her shares to the challenged registration statement. *See id.* at 671. The Court held that individual issues of "tracing" "d[id] not merit denial of [plaintiff's] motion for class certification." *Id.* The Court found that the named plaintiffs had already established that they could "trace" their shares to the challenged registration statement and that the issue of whether the unnamed, absent class members could "trace" their shares was "a question of fact reserved for trial." *Id.* Unlike in *LILCO,* the issue of "tracing" can and should be resolved on a motion to dismiss in this case. Here, the named plaintiffs (the Whittington Plaintiffs) have asserted a "statistical tracing" theory; thus, they have admitted that, as a matter of law, they cannot "trace" their shares to the June 2001 Registration Statement. *See, e.g., Davidco Investors*, [2005-2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 98,448-449 ("[S]tanding cannot be based on a statistical tracing theory . . . "); *Alamosa,* 382 F. Supp. 2d at 864 ("[M]ere probability that a plaintiff can trace shares is clearly insufficient").

2. Leap Disclosed the Risks the Whittington Plaintiffs Claim Were Omitted from the June 2001 Registration Statement

It is well settled that a Section 11 claim must be dismissed where the defendants disclose the precise risks plaintiffs claim were omitted. *See* Open Brief at 25. Here, the Whittington Plaintiffs contend that the Leap Defendants failed to warn them that a purchase price dispute with a company called MCG PCS, Inc. ("MCG") could dilute the value of their Leap stock and trigger a default under Leap's loan covenants. *See id.* at 25-29. As the Leap Defendants demonstrated in the Opening Brief, Leap disclosed these risks in its public filings. *See id.*

The Whittington Plaintiffs attempt to salvage their Section 11 claims by characterizing Leap's ample risk disclosures as "vague and ambiguous" and "woefully inadequate boilerplate." Pls. Opp. at 30. The Whittington Plaintiffs' hyperbole notwithstanding, it is readily apparent from a review of the actual risk disclosures that the Whittington Plaintiffs *were* explicitly and specifically warned of *all* the risks they claim were omitted. *See* Open Brief at 26-29. Before any of the Whittington Plaintiffs purchased a single share of Leap stock, he or she was told, *inter alia*, that Leap would be issuing additional shares of stock, which would dilute the value of the Leap stock then outstanding; that Leap had purchased wireless licenses from MCG and MCG was asserting that it

was entitled to a purchase price adjustment that could effectively double the original purchase price of those licenses; that Leap could pay the purchase price adjustment in cash or stock; and that Leap's credit facilities included change of control provisions, which could trigger an event of default if a substantial number of shares were issued to another entity, such as MCG. *See id.* Because these are the precise risks the Whittington Plaintiffs contend were omitted from the June 2001 Registration Statement, their Section 11 claims fail as a matter of law. *See id.* at 25-29 (citing authority).

Moreover, the Court should note that the Whittington Plaintiffs are effectively alleging that the Leap Defendants failed to predict in June 2001 that, over one year later, there would be an unfortunate confluence of negative events. When Leap filed the June 2001 Registration Statement, Leap and MCG were only in the early stages of the purchase price dispute and Leap stock was trading at approximately $30.00 per share. *See* Open Brief at 11-12. By July 2002, Leap stock had fallen from approximately $30.00 per share to less than $1.00 per share. *See id.* at 12. In August 2002, Leap lost the purchase price adjustment dispute with MCG in its entirety. *See id.* at 13. By that time, Leap did not have sufficient cash to pay MCG, so it had to pay the purchase price adjustment in stock – *at the now diminished stock price. See id.* at 12-13. As a result, MCG wound up owning more than 28% of Leap's outstanding shares

on a fully diluted basis, which constituted an event of default under Leap's credit facilities. *See id.* at 13. Nobody could have predicated these events in June 2001. Nor do the securities laws require such prediction. They require only the disclosure of material facts based on information available at the time. *See Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 519 (S.D.N.Y. 2005) ("'Corporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them'"), quoting *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)), *aff'd*, 157 Fed. Appx. 398 (2d Cir. 2005). Since the Whittington Plaintiffs fail to plead the omission of any such facts, their Section 11 claims should have been dismissed. *See* Open Brief at 25-29 (citing authority).

B. The Circuit Court Should Have Dismissed The Whittington Plaintiffs' State Law Claims

To state a claim under Section 717(a)(2) of the MSA or common law fraud, plaintiffs must plead that defendants intentionally made untrue statements or omissions of material fact which plaintiffs relied upon and which caused their losses. *See* Open Brief at 30-31 (citing authority). As the Leap Defendants demonstrated in the Opening Brief, the Whittington Plaintiffs' state law claims should have been dismissed because they fail to plead essential elements of those claims, including an untrue statement or omission of

material fact, loss causation (*i.e.*, proximate cause), and scienter (*i.e.*, intent). *Id.* at 29-35.

The Whittington Plaintiffs contend that loss causation cannot be resolved on a motion to dismiss because it "is an issue of fact for trial." *See* Pls. Opp. at 34 (emphasis omitted). The Whittington Plaintiffs ignore the applicable legal authority. As shown in the Opening Brief, courts routinely dismiss claims for securities fraud where it is apparent on the face of the complaint that plaintiffs' alleged losses were not caused by the alleged wrongdoing. *See* Open Brief at 31-33 (citing authority). Here, the Whittington Plaintiffs admit that Leap's stock had lost over 98% of its value *before* the alleged "truth" concerning Leap's purchase price dispute with MCG was disclosed. *See* Open Brief at 32. Accordingly, the Whittington Plaintiffs' own allegations establish conclusively that the Leap Defendants' alleged wrongdoing could not have caused their losses. *See, e.g., In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 289 F. Supp. 2d 429, 437 (S.D.N.Y. 2003) (dismissing claims where plaintiffs alleged that the value of their investment lost over 74% of its value *before* the disclosure of the alleged fraud; "price decline before disclosure may not be charged to defendants").

The Whittington Plaintiffs also contend that they have adequately alleged that the Leap Defendants

acted with scienter. *See* Pls. Opp. at 41.[3] As the Leap Defendants demonstrated in the Opening Brief, the Whittington Plaintiffs cannot survive a motion to dismiss with vague allegations that the Leap Defendants, *as a group,* acted with scienter. *See, e.g.,* Pls. Opp. at 41-42 (quoting FARC ¶¶ 110, 112). Instead, the Whittington Plaintiffs must "particularize each defendant's alleged participation in the fraud." *See* Open Brief at 34-35 (quoting *Lou v. Belzberg,* 728 F. Supp. 1010, 1022-23 (S.D.N.Y. 1990)); *see also* Miss. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated *with particularity.*") (emphasis added). Because the Whittington Plaintiffs have not made any scienter allegations that are specific to any of the Leap Defendants, their state law claims should have been dismissed for failure to plead adequately the element of scienter.

Recognizing the fundamental flaws in the FARC, the Whittington Plaintiffs now contend that loss causation and scienter are not elements of a claim

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[3] The Whittington Plaintiffs contend that they have adequately alleged an untrue statement or omission of material fact as well. As shown above (*see supra* at 7-8), the Leap Defendants disclosed all the risks the Whittington Plaintiffs contend were omitted from the June 2001 Registration Statement. This provides a separate and independent basis for dismissing the Whittington Plaintiffs' state law claims.

under Section 717(a)(2).[4] Notably, the Whittington Plaintiffs contend that this Court "has never been called upon" to rule on the elements of a Section 717(a)(2) claim. The Whittington Plaintiffs misapprehend this Court's decision in *Russell v. S. Nat'l Foods, Inc.*, 754 So.2d 1246 (Miss. 2000).

In *Russell,* this Court affirmed a trial court decision granting summary judgment in favor of defendants on all claims asserted by plaintiffs, including a claim under Section 717(a)(2) of the MSA. *See id.* at 1247. This Court explained that to survive a motion for summary judgment, plaintiffs must establish, "by affidavit or otherwise," the existence of facts to support each element of their claims. *Id.* at 1254. The Court then found that plaintiffs had not submitted evidence to support key elements of their claim under Section 717(a)(2). *Id.* at 1255-56. In particular, the Court observed that plaintiffs had not submitted any evidence to establish the element of intent, even though "an affirmative intent to deceive must be shown." *Id.* at 1256. The Court also noted that plaintiffs had not shown that defendants' false

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[4] The Whittington Plaintiffs tacitly acknowledge that loss causation and scienter are elements of a claim for common law fraud. *See* Pls. Opp. at 43 (citing *Welsh v. Mounger*, 883 So.2d 46, 48 (Miss. 2004)). Thus, even if the Whittington Plaintiffs are correct that loss causation and scienter are not elements of a claim under Section 717(a)(2) of the MSA, their claims for common law fraud fail as a matter of law because they have not pleaded these elements.

statements or omissions caused their losses, even though "recovery is not permitted if the proximate cause of the monetary loss is other than the fraud alleged." *Id.* Thus, contrary to the Whittington Plaintiffs' contentions, this Court *has* determined that a plaintiff asserting a claim under Section 717(a)(2) must establish loss causation (*i.e.*, proximate cause) and scienter (*i.e.*, an affirmative intent to deceive).

For the most part, the Whittington Plaintiffs ignore this Court's decision in *Russell*. *See* Pls. Opp. at 39. Instead, they argue that loss causation and scienter *cannot* be elements of a Section 717(a)(2) claim because Section 717(a)(2) "parallels" Section 12(a)(2) of the Securities Act of 1933, which does not require plaintiffs to plead and prove loss causation or scienter. *See* Pls. Opp. at 33, 40.[5] To support this argument, the Whittington Plaintiffs rely upon cases from other jurisdictions interpreting other states' Blue Sky laws. *See* Pl. Opp. at 35-36, 39-41.[6] As noted

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[5] Section 12(a)(2) provides that "[a]ny person who offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable . . . to the person purchasing such security from him." 15 U.S.C. § 77*l*.

[6] The Whittington Plaintiffs also rely upon the United States District Court for the Southern District of Mississippi's decision in *Fortenberry v. Foxworth Corp.*, 825 F. Supp. 1265 (S.D. Miss. 1993), In *Fortenberry*, the Southern District of Mississippi did not address the issue of whether loss causation

(Continued on following page)

above, however, this Court has held that Section 717(a)(2) of the MSA requires plaintiffs to plead and prove loss causation and scienter. The Whittington Plaintiffs do not explain why this Court should reverse its decision in *Russell* in favor of other courts' interpretations of other states' Blue Sky laws. Nor do they explain why this Court should expand the purview of Section 717(a)(2) to include situations where the defendant had no intent to deceive and the defendant's alleged misstatements did not cause plaintiff's losses.

Moreover, even if Section 717 "parallels" Section 12(2) of the Securities Act of 1933 (and loss causation and scienter are not elements of a Section 717 claim), the Whittington Plaintiffs' claims fail as a matter of law. Standing to assert claims under Section 12(2) is limited to a narrow class of persons. In particular, Section 12(2) permits a purchaser to recover from his immediate seller only. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 861 (5th Cir. 2003) ("The purchaser may recover against his immediate seller . . . "). Also, the United States Supreme Court has held that "[t]he intent of Congress and the design of

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is an element of a claim under Section 717(a)(2) of MSA. The Court did, however, conclude that scienter is not an element of a claim under Section 717(a)(2). *See Fortenberry*, 825 F. Supp. at 1279-80. To the extent *Fortenberry* is inconsistent with this Court's decision in *Russell*, the Leap Defendants respectfully submit that *Fortenberry* was wrongly decided and should be disregarded.

the statute require that [Section] 12(2) liability be limited to public offerings." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 578 (1995). Thus, "the only [persons] who have standing to sue under Section 12 are those who have purchased their shares directly from a seller in a public offering." *Moskowtiz v. Mitcham Indus.*, No. Civ. A. 98-1244, 1999 WL 33606197, at *19 (S.D. Tex. Sept. 29, 1999); *see also Rosenzweig*, 332 F.3d at 871 (dismissing Section 12(2) claims where plaintiffs conceded that they did not acquire their securities directly from the defendants).

As noted previously, the Whittington Plaintiffs admit that they did not purchase their shares directly from Leap in a public offering pursuant to the June 2001 Registration Statement. *See supra* at 3. Instead, they allege that they purchased their shares in the public market months after the June 2001 Registration Statement was. filed. *See id.* Thus, if Section 717(a)(2) "parallels" Section 12(2), as the Whittington Plaintiffs argue, their claims under Section 717(a)(2) fail as a matter of law because, by their own admission, they do not have standing to assert those claims. *Cf. Booth v. Verity, Inc.*, 124 F. Supp. 2d 452, 463 (W.D. Ky 2000) (dismissing claims under Section 292.480 of the Kentucky Blue Sky Laws where plaintiffs admitted that they had not purchased their shares directly from the defendant; holding that Section 292.480 "parallels" Section 12(2) of the Securities Act of 1933 and, thus, "imposes liability on only the buyer's immediate seller").

II. THE CIRCUIT COURT ERRED IN DENYING THE LEAP DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

A. The Arbitration Provision of the Agreement Applies to This Dispute

As the Leap Defendants noted in the Opening Brief, the Agreement between Leap and AWG provides for arbitration of "any dispute, claim or controversy arising under th[e] Agreement or in any way related to th[e] Agreement." Open Brief at 38 (quoting Section 12.11 of the Agreement). Here, the Whittington Plaintiffs' claims clearly "aris[e] under" or "relate[ ] to" the Agreement. *See id.* at 38-39. Specifically, the Whittington Plaintiffs allege that (i) pursuant to Sections 2.1 and 2.2 of the Agreement, Leap issued approximately 1.9 million shares of Leap stock to AWG; (ii) pursuant to Section 7A of the Agreement, Leap registered those shares by filing the June 2001 Registration Statement; (iii) pursuant to the "plan" contemplated by the Agreement, AWG sold those shares "during the fall of 2001" so the Whittington Plaintiffs could purchase those shares in the public market "in the period following September 2001;" and (iv) the Whittington Plaintiffs suffered damages as a result of those purchases due to the allegedly inadequate risk disclosures in the June 2001 Registration Statement. *Id.* Thus, the Whittington Plaintiffs claims are within the scope of the arbitration clause of the Agreement.

Appendix C

The Whittington Plaintiffs virtually acknowledge that their claims relate to the Agreement. *See* Pls. Opp. at 5-6. The Whittington Plaintiffs nevertheless contend that their claims are not within the scope of the arbitration clause because the FARC asserts tort and statutory claims that "are not based on contractual duties that arose from the Agreement but are based upon common law and statutory duties that arise independently and separately from the existence of the Agreement." Pls. Opp. at 14. This argument fails for at least two reasons.

First, AWG recently agreed to arbitrate its claims against the Leap Defendants pursuant to the arbitration clause of the Agreement. *See* Pls. Opp. at 10. As the Leap Defendants demonstrated in the Opening Brief, AWG's claims are predicated on *exactly the same facts* as this action; AWG has asserted *exactly the same causes of action* as asserted in this action; the AWG Complaint is identical in all material respects to the FARC; and AWG and the Whittington Plaintiffs are represented by *the same counsel. See* Open Brief at 14. Thus, since AWG has conceded that its claims are within the scope of the arbitration clause, the Whittington Plaintiffs cannot credibly argue that their claims are not.

Second, the fact that the Whittington Plaintiffs have asserted tort and statutory claims (as opposed to contract claims) has no bearing on whether their claims are within the scope of the arbitration clause. *See* Open Brief at 39-40; *see also Grigson v. Creative*

Artists Agency, L.L.C., 210 F.3d 524, 526 (5th Cir. 2000) (parties cannot avoid arbitration agreements simply "by casting their claims in tort, rather than in contract;" permitting non-signatories to compel arbitration of claims for tortious interference with a distribution agreement).[7] Under the FAA, arbitrability is determined by the language of the arbitration clause, not the type of claims asserted. *See Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 723 (Miss. 2002) (compelling arbitration of tort claims because they fell within the scope of an agreement providing for arbitration of "any controversy arising out of or relating to" the agreement); *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 726 (Miss. 2001) (compelling plaintiff to arbitrate claims for breach of fiduciary

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[7] *See also Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 767 (N.D. Ill. 2005) ("'[I]t is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than in contract'"; permitting non-signatory to compel arbitration of tort claims that related to the agreement containing the arbitration clause) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993)); *Pacific Life Ins. Co. v. Heath*, 370 F. Supp. 2d 539, 544 (S.D. Miss. 2005) ("A party to an arbitration agreement cannot avoid its consequences by simply 'casting her claims in tort, rather than in contract'"; compelling defendant to arbitrate her claims even though the majority of them arose from tort, not contract, principles) (quoting *Grigson*, 210 F.3d at 526); *Keytrade USA, Inc. v. M/V AIN Temouchent*, No. Civ. A. 01-1617, 2003 WL 122312, at *3 (E.D. La. Jan. 10, 2003) ("[P]arties cannot avoid arbitration agreements simply 'by casting their claims in tort, rather than in contract'") (citation omitted).

duty, negligence, and conspiracy because they were within the scope of an agreement providing for arbitration of "any controversy arising out of or relating to" the agreement). As this Court explained in *IP Timberlands Operating Co. v. Denmiss Corp.*, "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue" the parties should be required to arbitrate their claims and "a stay pending arbitration should be granted." 726 So.2d 96, 107 (Miss. 1998) (citation omitted). Thus, regardless of whether the Whittington Plaintiffs have asserted tort, statutory or contract claims, the relevant inquiry in this case is whether those claims "aris[e]s under" or "relate[ ] to" the Agreement. *See* Whitt. Rec. at 683-684 (quoting Section 12.11 of the Agreement).

This Court's decision in *Performance Toyota* is on point. In *Performance Toyota,* plaintiff entered into an agreement with an automobile dealership to sell a Toyota T-100 and purchase a Toyota Tacoma. The agreement provided for arbitration of "[a]ny controversy or claim arising out of or relating to the vehicle which is the subject of this contract." 826 So.2d at 723. The dealership repossessed the Tacoma and plaintiff filed an action for fraud, wrongful repossession and illegal conversion. This Court held that plaintiffs claims were within the scope of the arbitration clause. Although plaintiff had asserted tort claims based on his "property rights," the Court found

that arbitration was required because "[a]ll of [plaintiff's] claims pertain to the disputed ownership of . . . the two vehicles which are the subject of the Purchase Agreement." *Id.* at 723. The Leap Defendants cited and discussed *Performance Toyota* in the Opening Brief (*see* Open Brief at 39-40); the Whittington Plaintiffs did not address this decision in their Opposition.

Performance Toyota applies here. As discussed above, each of the Whittington Plaintiffs' claims "aris[es] under" or "relates to" the principal transaction underlying the Agreement: Leap's obligations under Sections 2.1 and 2.2 of the Agreement to issue approximately 1.9 million shares of Leap stock to AWG in exchange for AWG's wireless licenses. *See* Open Brief at 38-39. Likewise, each of the Whittington Plaintiffs' claims "aris[es] under" or "relate[s] to" the adequacy of the risk disclosures in the June 2001 Registration Statement, which Leap filed pursuant to its obligation under Section 7.4 of the Agreement. *See id.* Thus, regardless of whether the Whittington Plaintiffs' claims are based on "duties that ar[o]se independently and separately from the existence of the Agreement" (*see* Pls. Opp. at 14), their claims clearly "aris[e] under" and "relate[ ] to" the principal transactions underlying the Agreement, and are therefore within the scope of the arbitration clause.

B. Although the Leap Defendants Did Not Sign the Agreement, They May Enforce the Arbitration Clause

As the Leap Defendants demonstrated in the Opening Brief, the doctrine of equitable estoppel permits non-signatory defendants to enforce arbitration clauses in cases in which (1) plaintiffs "'make[] reference to or presume[] the existence of'" the agreement containing the arbitration clause; or (2) plaintiffs allege "'substantially interdependent and concerted misconduct'" by the non-signatory and one or more of the signatories to the agreement. *See* Open Brief at 42 (citing authority). Because both elements of equitable estoppel are present here, the Leap Defendants may enforce the arbitration clause even though they did not sign the Agreement. *See id.* at 43-44.

The Whittington Plaintiffs contend that equitable estoppel does not apply here because "it is clear from the Complaint that the [Whittington Plaintiffs'] claims are derived from statutory and common law and not the Agreement." Pls. Opp. at 15. This argument is neither a correct statement of law nor an accurate description of the FARC. As shown in the Opening Brief, the FARC recounts in detail how Leap, the Leap Defendants, AWG, and the Whittington Plaintiffs negotiated and structured the transaction that was ultimately reflected in the Agreement. *See* Open Brief at 44; *see also* Pls. Opp. at 5-6. Likewise, the FARC is focused on the June 2001 Registration

Statement (*see* Open Brief at 44), which Leap filed pursuant its obligation under Section 7.4 of the Agreement. Thus, the Whittington Plaintiffs' claims clearly make reference to and presume the existence of the Agreement. *See Holden v. Deloitte & Touche LLP,* 390 F. Supp. 2d 752, 766 (N.D. Ill. 2005) (plaintiffs' claims made reference to and presumed existence of the agreement where they "allege[d] that a central goal of the conspiracy and claimed fraud [sic] scheme was to induce individuals like [plaintiffs] to 'sell their companies' to EPS, as [plaintiffs] did through the [agreement]").

The Whittington Plaintiffs also contend that they have not alleged substantially interdependent and concerted misconduct by Leap and the Leap Defendants. *See* Pls. Opp. at 15. Again, the Whittington Plaintiffs mischaracterize their allegations. A review of the FARC confirms that the Whittington Plaintiffs have alleged substantially interdependent and concerted misconduct by Leap and the Leap Defendants. For instance, the FARC refers to Leap as a "Co-Conspirator" and "Joint Tortfeasor" and alleges that the Leap Defendants acted "on behalf of," "in concert or conspiracy with," "aided and abetted" and "carried out a plan, scheme or course of conduct" with Leap. *See* Open Brief at 44. The FARC also alleges that "Leap was the 'seller' of the Leap Stock that the [Whittington] Plaintiffs acquired and are here suing upon, and the [Leap] Defendants were aiders/abettors and control persons of Leap as the 'seller'." Whitt.

Rec. at 151 (FARC ¶39(c)); *see also* Pls. Opp. at 16. Thus, contrary to the Whittington Plaintiffs' contentions, both elements of equitable estoppel are present here and the Leap Defendants are entitled to enforce the arbitration provision of the Agreement.

The Whittington Plaintiffs' reliance on *Primerica Financial Services, Inc. v. Coley*, 192 F. Supp. 2d 655 (N.D. Miss. 2002), is misplaced. In *Primerica,* Catherine Coley opened a mutual fund account with Primerica Financial Services Investments, Inc. ("Primerica"). The agreement for the mutual fund account provided for arbitration of all claims asserted "in connection with the mutual fund transaction." *Id.* at 656. Coley subsequently purchased a life insurance policy from two companies that were affiliated with Primerica: Primerica Financial Services, Inc. ("PFS") and Primerica Life Insurance Company ("PLIC"). Coley then filed a state court action against PFS and PLIC for fraudulent misrepresentation in connection with her purchase of life insurance. PFS and PLIC moved in federal court to compel arbitration under the agreement for the mutual fund account. The Court held that PFS and PLIC could not enforce the arbitration clause under equitable estoppel because (i) "Coley ha[d] not raised allegations of 'substantially interdependent and concerted' misconduct by both the non-signator[ies], PFC and PLIC, and the signatory [Primerica];" and (ii) Coley's claims involved "Coley's purchase of life insurance," not "the mutual fund transaction." *Id.* at 656-58. Unlike in *Primerica,* the

Whittington Plaintiffs have alleged substantially interdependent and conceited misconduct by the non-signatory Leap Defendants and Leap, one of the signatories to the Agreement. *See supra* at 16. Also, the Whittington Plaintiffs' claims involve the principal transactions underlying the Agreement. *See supra* at 15.

The Whittington Plaintiffs' contention that "the Agreement between AWG and Leap explicitly limits enforcement by non-parties" (Pls. Opp. at 16) is unavailing. The Whittington Plaintiffs do not and cannot point to any language in the Agreement specifically prohibiting enforcement of the arbitration clause by non-parties in accordance with settled principles of equitable estoppel. Nor do they cite any legal authority to support their position. Instead, the Whittington Plaintiff's point to Section 12.4(b) of Agreement, which generally limits the creation of third-party rights under the Agreement. *See* Pls. Opp. 10-11; *see also* Whitt. Rec. at 682. This provision, entitled "Successors and Assigns," does not prohibit the Leap Defendants from enforcing the arbitration clause for at least three reasons:

> First, . . . [t]hese sorts of provisions are *de riguer,* and one can reasonably assume that similar provisions existed in the series of cases establishing the equitable estoppel and agency bases for compelling arbitration. Second, and independently, agency concepts and coconspirator concepts teach that the alleged coconspirator (or coschemer, or agent) is

> effectively in the shoes of the signatory defendant and that the two parties are responsible for each other's misconduct. As a result, the idea that other third parties might not otherwise acquire rights under contractual liability is, with all respect, beside the point. The non-signatory, by virtue of the plaintiffs' allegations, is standing in the shoes of the signatory. Third, and again independently, to the extent that application of equitable estoppel has to do with concepts of fairness – and precedent would suggest that it has much to do with them . . . – it would seem unjust to preclude a non-signatory who would otherwise fairly be entitled to compel arbitration simply because the signatory sought to freeze out the non-signatory's rights in a contract to which the non signatory was not a named party.

Holden, 390 F. Supp. 2d at 767 (rejecting plaintiffs' argument that "a provision limiting the creation of third-party" rights prohibited the defendant from enforcing the arbitration clause of an agreement it did not sign) (citations omitted).

The cases the Whittington Plaintiffs rely upon are inapposite. *See Adams v. Greenpoint Credit, LLC,* 943 So.2d 703 (Miss. 2006); *Jim Burke Automotive, Inc. v. McGrue,* 826 So.2d 122 (Ala. 2002). The agreements in those cases did not contain provisions like the one at issue in this case – *i.e.*, a provision limiting the creation of third-party rights. Instead, the agreements in those eases contained narrow arbitration

clauses providing for arbitration of disputes between the parties to the agreements only. *See Adams,* 943 So.2d at 706 ("[a]ny controversy or claim *between or among you or me or our assignees* arising out of or relating to this Contract . . . " (emphasis added) (citation omitted); *Jim Burke Automotive,* 826 So.2d at 128 ("[a]ll disputes, controversies or claims or any kind and nature *between the parties hereto* . . . ") (emphasis added). As a result, those cases held that disputes with third-patties arising out of the contracts were outside the scope of the arbitration clause. *See Jim Burke Automotive,* 826 So.2d at 131 ("Clearly, the arbitration agreements are limited to the signing parties . . . "); *see also Adams,* 943 So.2d at 708. Unlike in those cases, the arbitration clause in this case is not limited to disputes between the signing parties (Leap and AWG); instead, the arbitration clause covers "any dispute, claim or controversy arising under this Agreement or in any way related to this Agreement." Open Brief at 38 (quoting Section 12.11 of the Agreement).

C. Although the Whittington Plaintiffs Did Not Sign the Agreement, They Are Estopped from Avoiding Arbitration

In a last-ditch attempt to avoid arbitration, the Whittington Plaintiffs contend that equitable estoppel is a limited doctrine that "applies only to prevent 'a ***signatory*** from avoiding arbitration with a nonsignatory.'" Pls. Opp. at 18 (emphasis in original).

Thus, the Whittington Plaintiffs argue that even if the Leap Defendants can enforce the arbitration clause against a signatory to the Agreement (such as AWG), they cannot enforce it against non-signatories, such as the Whittington Plaintiffs. *Id.* at 10-11. The Whittington Plaintiffs misstate the law.

Under equitable estoppel, a non-signatory plaintiff may be estopped from refusing to comply with an arbitration clause "when it [has] receive[d] a 'direct benefit' from a contract containing an arbitration clause." Open. Mem. at 46. As this Court has recognized: "[t]o allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]." *Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1058 (Miss. 2004) (quoting *Washington Mut. Fin. Group, LLC v. Bailey,* 364 F.3d 260, 268 (5th Cir. 2004)).

Here, the FARC rests on the allegation that the Agreement between Leap and AWG was intended to benefit the Whittington Plaintiffs individually by placing Leap stock in their hands. *See* Open Brief at 47 (citing FARC ¶¶ 4, 39, 105). The Whittington Plaintiffs contend that Leap filed the June 2001 Registration Statement (pursuant to its obligation under Section 7.4 of the Agreement) for the "***sole purpose*** of selling the Leap Stock from AWG to the Whittington Plaintiffs and other members of AWG." Pls. Opp. at 23 (emphasis in original). The Whittington Plaintiffs also contend that they did, in fact,

receive certain benefits from the Agreement by purchasing "the Leap Stock that had been owned by [AWG], had been registered by Leap, and had been sold into the public market." Open Brief at 47 (quoting FARC ¶4). Thus, even though the Whittington Plaintiffs did not sign the Agreement, they are estopped from refusing to comply with the arbitration provision.

The Whittington Plaintiffs contend that "[n]o court has applied the estoppel theory in situations where a ***non-signatory*** seeks to enforce an agreement against ***another non-signatory***." Pls. Opp. at 19. The Whittington Plaintiffs are wrong. In *Mississippi Fleet Card, L.L.C. v. BilStat, Inc.*, 175 F. Supp. 2d 894 (S.D. Miss. 2001), the United States District Court for the Southern District of Mississippi held that the non-signatory officers and directors of a corporation could enforce an arbitration clause against the non-signatory members of a limited liability company. In that case, Mississippi Fleet Card, L.L.C. ("MFC") entered into an agreement with BilStat, Inc. ("BilStat"). *See* 175 F. Supp. 2d at 896. The agreement contained an arbitration clause. MFC and its members subsequently filed an action against BilStat and its officers and directors. While MFC and BilStat signed the agreement containing the agreement clause, MFC's members and BilStat's officers and directors did not. The Southern District of Mississippi held that the *non-signatory* officers and directors of BilStat could enforce the arbitration

clause against the *non-signatory* members of MFC because, *inter alia,* the "[m]embers contend that they, in their individual capacities, were to receive benefits under the . . . [a]greement." 175 F. Supp. 2d at 903. *Mississippi Fleet Card* applies here. As noted previously, the non-signatory Leap Defendants (current and former officers and directors of Leap) seek to enforce the arbitration clause of the Agreement against the non-signatory plaintiffs (the members of AWG); and the Whittington Plaintiffs contend that they, in their individual capacities, were to receive and, in fact, did receive, "benefits" under the Agreement.

Notably, in *Mississippi Fleet Card,* the Southern District of Mississippi applied the same analyses that courts have applied in other cases involving the doctrine of equitable estoppel, *i.e.,* cases in which a non-signatory sought to enforce an arbitration clause against a signatory and cases in which a signatory sought to enforce an arbitration clause against a non-signatory. Thus, the Whittington Plaintiffs' contention that the Court's analysis of this case should somehow be different (because the non-signatory Leap Defendants seek to enforce the arbitration clause against the non-signatory Whittington Plaintiffs) rings hollow.

The Whittington Plaintiffs' reliance on *Bridas S.A.P.I.C. v. Government of Turkmenistan,* 345 F.3d 347 (5th Cir. 2003), is misplaced. In that case, a signatory plaintiff sought to enforce an arbitration

agreement against a non-signatory defendant. *See id.* at 351, 362. The Court held that because the non-signatory defendant had not filed an action or asserted any claims against the signatory plaintiff, there was no equitable basis for enforcing the arbitration clause against him. *See id.* at 360-62. *Bridas* does not apply here. In this case, the non-signatory Whittington Plaintiffs *have* filed an action and asserted claims against the Leap Defendants. Moreover, the Whittington Plaintiffs claims allege that they received a direct benefit from the Agreement. *See supra* at 20. Thus, there is an equitable basis for enforcing the arbitration provision against them. *See, e.g., Terminix*, 904 So.2d at 1058 ("To allow a plaintiff to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opening Brief, the Leap Defendants respectfully request that this Court remand the *Whittington* action to the Circuit Court with instructions to enter an order dismissing the *Whittington* action in its entirety for failure to state a claim upon which relief can be granted. In the alternative, the Leap Defendants respectfully request that this Court remand the *Whittington* action to the Circuit Court with instructions to enter an order compelling the

Appendix C

Whittington Plaintiffs to arbitrate their claims and staying all proceedings in the *Whittington* action pending arbitration.

RESPECTFULLY SUBMITTED this the 8th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served on all counsel of record herein via U. S. Mail, postage pre-paid, this the 8th day of March, 2007.

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